
THE DNA DEFAULT AND ITS DISCONTENTS: ESTABLISHING MODERN PARENTHOOD

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| INTRODUCTION | 2038 |
| I. ORIGINS AND CONTEMPORARY USE OF THE DNA DEFAULT | 2043 |
| II. THE DNA DEFAULT IN THEORY..... | 2050 |
| A. <i>The Sex Police</i> | 2050 |
| B. <i>Women’s Reproductive Labor</i> | 2056 |
| C. <i>Children’s Interest in the DNA Default</i> | 2062 |
| III. THE DNA DEFAULT IN PRACTICE | 2065 |
| A. <i>The DNA Default and Child Support</i> | 2066 |
| B. <i>The DNA Default and Custodial Rights</i> | 2069 |
| IV. MARRIAGE AND PARENTAL STATUS | 2081 |
| A. <i>The Work That Marriage Does</i> | 2082 |
| B. <i>Alternatives to Marriage</i> | 2085 |
| 1. Adoption and License..... | 2085 |
| 2. Contract and Mutual Consent..... | 2087 |
| C. <i>Embracing the Possibilities</i> | 2088 |
| CONCLUSION | 2090 |

Most contemporary family law scholarship assumes the propriety of a DNA default for establishing parenthood—a presumption that, in the absence of marriage, whoever had the sex with the mother that resulted in the child should be the father of the child. This Article problematizes the DNA default. It demonstrates how the DNA default necessarily magnifies the legal and social importance of sex, discounts the legal significance of women’s reproductive labor, and marginalizes all children living outside the binary, heteronormative model that a genetic regime necessarily edifies. When scrutinized, the DNA default looks just as moralistic and exclusionary as a parentage regime rooted in marriage. Very few people in contemporary family-law scholarship acknowledge this problem, even as they fault the law for not being attentive to the struggles of nonmarital parents. Attending to the needs of nonmarital parents requires asking the preliminary question of who should be considered a parent, especially because in low-income communities, where marriage is rare and the DNA default has the most salience, the DNA default fails to do the job it was originally designed to do: provide for children. This Article echoes the

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call for the law to support nonmarital parenting, but it challenges both scholars and the law to be much more careful when deciding how to fill the gap left by rejecting marriage as the root of parentage. It suggests that the law should expand the paradigms used in adoption and reproductive technology contracts by trying to replicate the cooperative norms engendered by marriage to fill the void left by nonmarriage with a parental registration regime capacious enough to include pluralistic family forms and sensible enough to demythologize sex.

INTRODUCTION

A majority of the children in this country have their legal parentage determined by reference to the mother's marriage: the spouse of the woman who gives birth is the legal parent of the born child.¹ This marital presumption now usually applies to both opposite- and same-sex couples.² A much smaller group of children has its parentage determined by the granting of a state license to adults who apply to be parents (i.e., adoption) or of reproductive technology contracts (i.e., surrogacy or sperm donation). The rest of the children in this country—approximately forty percent—have their parentage determined by a DNA default, a presumption that whoever had the sex with the mother that resulted in the pregnancy is the father of the child.³

¹ The marital presumption can sometimes be overcome with genetic evidence, but states vary considerably on who has standing to present such evidence and when. *See generally* JUNE CARBONE & NAOMI CAHN, *MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY* 138-40 (2014) (explaining different state approaches to overcoming the marital presumption of paternity).

² The National Center for Lesbian Rights writes that, "[w]hen a legally married couple has a child, they are both automatically presumed to be the legal parents of the child. This means that, if they get divorced, they both remain legal parents unless a court terminates one or both of their parental rights. This presumption applies to same-sex parents when children are born to couples who are married or where their state recognizes their civil union or comprehensive domestic partnership at the time the child is born." NAT'L CTR. FOR LESBIAN RIGHTS, *LEGAL RECOGNITION OF LGBT FAMILIES 1* (2016), http://www.nclrights.org/wp-content/uploads/2013/07/Legal_Recognition_of_LGBT_Families.pdf [https://perma.cc/P7D3-HZAM]. States that resist this idea tend to also resist same-sex marriage. *See* Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1242-44 (2016) (detailing some states' use of biological factors to undermine the marital presumption of parenthood for same-sex couples). Most same-sex couples have been successful in demanding that the marital presumption be applied to them. *E.g.*, *Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 335, 351 (Iowa 2013) (finding that same-sex couples and marital couples are similarly situated for purposes of the marital presumption).

³ Of the children born in the United States, 40.7% of them are born to unwed mothers. Joyce A. Martin et al., *Births: Final Data for 2011*, 62 NAT'L VITAL STAT. REP., no. 1, June 28, 2013, at 1, 3, http://www.cdc.gov/nchs/data/nvsr/nvsr62_01.pdf [https://perma.cc/83Z2-5VY4]. Some of these children are born to single women, who are single by choice, and have gotten pregnant pursuant to a contract with a sperm provider or sperm bank. Others are women who have gotten pregnant through intercourse but have chosen not to name another parent. Most of the mothers of this 40.7% of children cosign a Voluntary Acknowledgement of Paternity ("VAP"), which operates as a determination of fatherhood in the signatory, based

This Article problematizes that DNA default. It upends the seemingly unassailable assumption that genetic progenitors are the adults to whom the law should assign parental status.⁴ In doing so, this Article echoes, but also challenges the common call in contemporary family-law scholarship for the law to support nonmarital parenting. Rejecting marriage as the paradigm for determining parentage is a laudable and overdue goal, but reformers must be more wary of what fills the void left by rejecting marriage. Currently, in most instances, if marriage does not determine parentage, genetics do. Using genetics to determine legal parentage is just as political as is using marriage to determine legal parentage.⁵ This Article argues it is a problematic political choice.

The DNA default magnifies the legal and social importance of sex. It roots parenthood in the sexual act, not in an intent to procreate or an agreement to parent or an ability to parent. When compared to how the law determines parenthood in cases of noncoital conception, the DNA default emerges as a massive, punitive regulation of sex. The DNA default also elevates genetic contributions over other biological and physical contributions to children. It makes a man's singular contribution to the reproductive process the sine qua non of parenthood, thus erasing the legal significance of women's reproductive labor. A genetic regime also necessarily reifies a heteronormative vision of parenting. It treats as inevitable a paradigm of two and only two parents, one male and one female.⁶ In short, the DNA default embodies a vision of parenting that should be viewed with skepticism by most of those calling on the law to alter its paradigms for determining parentage.

on genetic connection. *See infra* notes 63-64 and accompanying text (detailing VAP form questions, and shortcomings).

⁴ Glenn Cohen has questioned the inevitability of the genetic presumption, arguing that, in the context of assisted reproduction, men have the right to be anonymous sperm donors. *See* I. Glenn Cohen, *Response: Rethinking Sperm-Donation Anonymity: Of Changed Selves, Nonidentity, and One-Night Stands*, 100 GEO. L.J. 431, 432 (2012) (arguing that the movement to forbid sperm-donor anonymity is misguided) [hereinafter Cohen, *Rethinking Sperm-Donation Anonymity*]; I. Glenn Cohen, *The Right Not to Be a Genetic Parent*, 81 S. CAL. L. REV. 1115, 1121 (2008) (arguing that the rights to be a genetic, gestational, and/or legal parent do not stand and fall together).

⁵ One of the greatest dangers of the DNA default is that it treats parenthood as a "natural" relationship. It helps hide the inherently political nature of assigning parentage to certain individuals. As Martha Nussbaum notes "the name 'family' is a legal and political matter, never one to be decided simply by the parties themselves. . . . [I]t is the state that says what this thing *is* and controls how one becomes a member of it." Martha C. Nussbaum, *The Future of Feminist Liberalism*, in *THE SUBJECT OF CARE: FEMINIST PERSPECTIVES ON DEPENDENCY* 186, 199 (Eva Feder Kittay & Ellen K. Feder eds., 2002); *see also* MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA'S POLITICAL IDEALS* 14, 53 (2010) ("[W]hat counts as a family is inherently intertwined with politics and power. . . . The issue of what constitutes a family is not a pre-political question that can be determined based on science or nature . . .").

⁶ *See infra* notes 86-87 and accompanying text.

Making genetics determinative of parenthood is all the more questionable once one realizes that, in practice, the DNA default rarely does what it was designed to do. The law has used the DNA default primarily to find parents for children who might otherwise become dependent on the state.⁷ Thus, the DNA default is also deeply classed; it determines fatherhood for the majority of low-income children, and only rarely for middle- and upper-middle-class children.⁸ Many people agree that the current law of parenthood imposes unrealistic financial obligations on low-income genetic fathers,⁹ but several contemporary commentators also argue that these men need more legal protection in order to secure their rights as legal fathers.¹⁰ This Article offers another solution: cease treating many of these men as legal fathers at all.

Commentators tend to compare unwed genetic fathers to wed genetic fathers,¹¹ but “unwed families” are only necessarily similarly situated to “wed families” if we believe that genetics must be relevant to family status. If we remove genetics as the ubiquitous referent, the question becomes why not treat unwed genetic fathers like sperm donors. Exploring why unwed genetic fathers may be more like sperm donors than spouses leads to an analysis of why spouses, who are or were married, tend to be more effective coparents than adults who have not married. The marital presumption of parentage may be appropriate not because of what it presumes about the genetic relationship between an adult and a child, but because of what it presumes about the cooperative relationship between adults.

⁷ See *infra* Part I. In some, but not all, situations, the law is comfortable with the idea of a fatherless child. The children of lesbian couples often have no father, and the children of single women who conceive asexually, with purchased or donated sperm, also do not have fathers. See NeJaime, *supra* note 2, at 1240-41 (discussing instances in which the law recognizes fatherless children).

⁸ See Sara McLanahan, *Fragile Families and Children's Opportunities* 3 (Ctr. for Research on Child Wellbeing & Fragile Families, Working Paper No. 12-21, 2012), <http://crcw.princeton.edu/workingpapers/WP12-21-FF.pdf> [<https://perma.cc/4SJE-9JB6>] (pointing to statistics that indicate unmarried genetic parents who have children are much less educated and much more likely to be poor than married parents).

⁹ CARBONE & CAHN, *supra* note 1, at 193 (“We propose an end to state insistence on counterproductive child-support enforcement as a condition of state aid of any kind . . .”); Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 171 (2015) (“Child support laws, which are relatively effective for divorcing families, impose unrealistic obligations on unmarried fathers, many of whom have dismal economic prospects.”); see also *infra* notes 164-79 (citing various sources criticizing the challenges faced by low-income men who have significant child-support obligations).

¹⁰ KATHRYN EDIN & TIMOTHY NELSON, *DOING THE BEST I CAN: FATHERHOOD IN THE INNER CITY* 215 (2013) (asserting that the legal system and policies that have created “deadbeat dad” laws stoke a gendered battle in which fathers are disfavored); Solangel Maldonado, *Shared Parenting and Never-Married Families*, 52 FAM. CT. REV. 632, 633 (2014) (contending that the legal system favors maternal residential custody and burdens the person seeking shared parenting time).

¹¹ See, e.g., Maldonado, *supra* note 10, at 636.

The norms of interdependence, role sharing, and commitment that inform the modern social meaning of marriage likely render the adults who enter it well suited to jointly raise a child, regardless of whether the child is genetically related to them and regardless of whether the adults stay married. Having sex with someone, which is all that is required to trigger the DNA default, carries no comparable package of social norms. Like almost all contemporary family-law scholarship, this Article rejects marriage as the only legitimate root to parenthood, but it further unpacks the work that marriage does in reinforcing adults' commitments to each other to suggest that it is the relationship between adults that should be critical in assigning parental status to multiple adults.

The analysis proceeds as follows. Part I introduces the origins and contemporary use of the DNA default. Part II explores how the DNA default regulates sex, discounts women's labor, and marginalizes significant populations of children. It shows how the DNA default punishes men who do not want to be parents, women who do not want to have to share parenting with particular men, and children whose family structure does not, and very likely never will, mimic the genetic ideal. When scrutinized, the DNA default looks just as moralistic, restrictive, and exclusionary as a parentage regime rooted in marriage.

Part III looks at the DNA default in practice today, particularly in the low-income communities in which it is the primary means of assigning fatherhood. It shows that the DNA default usually neither serves the goal it was designed to serve, privatizing children's dependency, nor provides children with adult parents who can realistically help raise them. Child-rearing in most low-income, nonmarital communities is far more gendered, far less mutual, and far less cooperative than it is today for most married or divorced couples. The response from many commentators has been to give genetic fathers more parental rights,¹² but Part III argues that a better solution is not to assign fatherhood based on genetics at all. Most unwed, low-income genetic fathers deserve relief from cumbersome and counterproductive child support obligations, but affording them greater parental rights will not provide children with the parents they need.

Dispensing with genetics as the root of parenthood will not necessarily make men irrelevant in questions of parenthood. Instead, the law must design more logical ways of assigning parentage. Marriage may be one, though certainly not the only one, of those ways. Part IV analyzes the work that marriage does in

¹² See EDIN & NELSON, *supra* note 10, 215 (discussing the lack of power conferred on black unmarried fathers by a legal system that "tells them that they are a paycheck and nothing more"); CLARE HUNTINGTON, FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS 114-15 (2014) (suggesting family law should evolve towards "preserving and repairing relationships"); MERLE H. WEINER, A PARENT-PARTNER STATUS FOR AMERICAN FAMILY LAW 506 (2015) (proposing a "parent-partner" status that would facilitate greater father involvement with children); Huntington, *supra* note 9, at 171-72 (criticizing current laws that allow nonmarital fathers' time with their children to be controlled by maternal "gatekeepers"); Maldonado, *supra* note 10, at 633 ("[B]y rejecting a presumption of shared parenting, we in effect endorse the status quo.").

fostering coparenting. It shows how marriage assigns parentage regardless of genetics and incorporates norms that make both adults responsible to each other and the child in the child-rearing process.¹³ Because marriage has evolved into what Serena Mayeri refers to as “a privileged status and a status of the privileged,”¹⁴ the law needs alternatives to marriage for assigning parentage, but there is no reason to ignore the positive work that marriage does in fostering effective coparenting. There is robust evidence that children of married couples do better on almost all measures than children raised outside of marriage.¹⁵ Something about marriage appears to be good for children.¹⁶ Part IV explores what marriage likely does right in terms of coparenting so that the law can develop legal structures that better serve the familial needs of both parents and children.

¹³ See *infra* note Section IV.A (describing norms engendered by marriage that aid in child rearing).

¹⁴ Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CALIF. L. REV. 1277, 1283 (2015).

¹⁵ Correlation is not causation. See Shelly Lundberg & Robert A. Pollak, *The American Family and Family Economics*, 21 J. ECON. PERSP. 3, 19 (2007) (“Because family structure is intertwined with other parental characteristics that affect children, a causal relationship between family structure and child outcomes is difficult to establish.”). But, the correlation between marriage and child wellbeing is strong. See Lisa Gennetian, *One or Two Parents? Half or Step Siblings? The Effect of Family Structure on Young Children’s Achievement*, 18 J. POPULATION ECON. 415, 418 (2005) (“The more time a child spends in a single parent family, the bigger the gap in cumulative investment between that child and a child in a two-parent family.”); Donna K. Ginther & Robert A. Pollak, *Family Structure and Children’s Educational Outcomes: Blended Families, Stylized Facts, and Descriptive Regressions*, 41 DEMOGRAPHY 671, 676 (2004); Amy Wax, *Traditionalism, Pluralism and Same-Sex Marriage*, 59 RUTGERS L. REV. 377, 403-05 (citing studies on the effects of family structure on children); Ryan Heath Bogle, *Long-Term Cohabitation Among Unwed Parents: Determinants and Consequences for Children 1* (Bowling Green State Univ. Ctr. for Family & Demographic Research, Working Paper No. PWP-BGSU-2012-038, 2012), <http://papers.ccpr.ucla.edu/papers/PWP-BGSU-2012-038/PWP-BGSU-2012-038.pdf> [<https://perma.cc/W4MM-6D7J>] (citing studies showing that children of cohabitating unions run a greater risk of disruption, and have a greater risk of cognitive, behavioral, and economic trouble, than children of married parents). Some research suggests that being raised in the same household by both genetic parents is more important to positive outcomes than marriage. See Sandra L. Hofferth, *Residential Father Family Type and Child Well-Being: Investment Versus Selection*, 43 DEMOGRAPHY 53, 55-56 (2006) (indicating that children living with nongenetic fathers fare worse than children living with genetic fathers). But, forcing genetic parents to live together in the same household does not appear to be a solution that anyone endorses. And once the parents separate, what appears most important for children is whether the adults with whom they live get along, not whether the children are biologically related to the adults. See *infra* notes 197-98.

¹⁶ Ginther & Pollak, *supra* note 15, at 672 (reporting better outcomes for children reared in traditional nuclear families than children reared in blended families); Robert Lerman & Elaine Sorenson, *Father Involvement with Their Nonmarital Children: Patterns, Determinants, and Effects on Their Earnings*, 29 MARRIAGE & FAM. REV. 137, 148 (2000) (citing statistics that indicate that the stability of marriage promotes quality parenting).

The analysis of marriage suggests that notions of formality or license and mutual consent or contract, which already operate at the margins of the assignment of parentage for adoptive families and families who use reproductive technologies, provide useful constructs for trying to incorporate cooperative commitment norms into parentage without relying on marriage itself. By looking at how family law assigns parentage at the margins, this Article ultimately shows how the law can fill the gap left by nonmarriage with what matters to effective parenting, not genetics.

I. ORIGINS AND CONTEMPORARY USE OF THE DNA DEFAULT

Parentage is a legal construct, which is important to underscore because contemporary law and norms tend to treat genetic fatherhood as “true” and “real.” Genetic fatherhood is inevitable in that each child must have a genetic father, but there is no reason why genetic fatherhood must be legal fatherhood. Under Roman law, a child’s parentage was based on the law’s recognition of the mother’s partner, in either matrimony or legal concubinage.¹⁷ A child born to a woman without a legally recognized partner was *filius nullius*, a child of no one.¹⁸ If she could afford to, financially and socially, the mother was usually allowed to rear the child.¹⁹ Thus, *filius nullius* are probably more accurately described, in modern parlance, as children of single parents.

As the Roman Empire’s power faded and the Catholic Church became the focal point of people’s social life, local parishes often accepted responsibility for infants whose mothers could not afford to care for them alone.²⁰ In an effort to alleviate some of that burden, in 1234, Pope Clement III issued an edict requiring fathers to support their nonmarital children.²¹ Pope Clement did not use the term “genetic father,” but few doubt that what he meant by the term

¹⁷ R. H. Helmholz, *Support Orders, Church Courts, and the Rule of Filius Nullius: A Reassessment of the Common Law*, 63 VA. L. REV. 431, 433 (1977) (stating that there was no duty to support children born out of wedlock or concubinage).

¹⁸ Joseph Cullen Ayer, Jr., *Legitimacy and Marriage*, 16 HARV. L. REV. 22, 22 (1902).

¹⁹ See JOHN BOSWELL, *THE KINDNESS OF STRANGERS: THE ABANDONMENT OF CHILDREN IN WESTERN EUROPE FROM LATE ANTIQUITY TO THE RENAISSANCE* 68-69 (1988) (discussing Roman law applicable to children born to unmarried women). Most infants born to unwed mothers were probably abandoned, and John Boswell estimates that between twenty and forty percent of all Roman children were abandoned. *Id.* at 135. English common-law doctrine is known for being particularly hard on illegitimate children. See MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 197-200 (1985) (discussing American willingness to adopt the more moderate civil-law traditions allowing legitimation). But even in England, illegitimate children were treated as the children of their mothers, though their inheritance rights were severely limited. See WILFRID HOOPER, *THE LAW OF ILLEGITIMACY* 25-27 (1911) (discussing various ways in which the law treated an illegitimate child as the child of its mother).

²⁰ Helmholz, *supra* note 17, at 435-36 (quoting a medieval canonist’s assertion that the Church has a responsibility to nourish children).

²¹ *Id.* at 434.

“father” was the man who had the sex with the woman that resulted in the pregnancy that produced a child.²² Given the state of biological science in the year 1234, it would have been hard for him to mean anything else. Ecclesiastical courts enforced the Pope’s edict to the extent they could, but proving paternity in a time when no one had come close to conceptualizing what genes were was no doubt difficult.²³ The trials could only be about who had sex with whom.

As ecclesiastical authority gave way to secular governments, different European legal systems addressed nonmarital procreation in a variety of ways. In seventeenth- and eighteenth-century France, married men could not be sued in paternity, though unmarried men could be.²⁴ The Napoleonic Code and Dutch law eliminated all paternity actions in the nineteenth century.²⁵ German law had its own history.²⁶ Paternity laws in Europe today continue to be less uniform and less definitive than in Anglo-American countries; the genetic father’s financial liability in those countries is usually significantly less than it is in the United States, and the men are rarely awarded the full panoply of custodial rights that accompany legal fatherhood in the United States.²⁷

British law proceeded differently. The secular Anglo-American paternity suit originated as part of the British Poor Law legislation of 1574.²⁸ These suits were brought by justices of the peace and were limited to actions against the genetic fathers of children whose mothers were receiving support from the state.²⁹ As they are today, these suits were necessarily classed because they were designed to alleviate a state’s welfare burden, though they also helped police sexual

²² *Id.*

²³ The birth of modern genetic science is usually traced to Gregory Mandel, a late nineteenth century Austrian monk. See *History of Genetics*, KENYON U. BIOLOGY DEP’T, http://biology.kenyon.edu/courses/biol114/Chap01/history_genetics.html [<https://perma.cc/7Q77-CHP2>] (last visited Sept. 16, 2016) (chronicling important steps in human understanding of genetics).

²⁴ JENNY TEICHMAN, *ILLEGITIMACY: AN EXAMINATION OF BASTARDY* 154-55 (1982) (“It was possible for a mother to take out filiation proceedings against the putative father, but only if he was unmarried.”).

²⁵ J. E. Scholtens, *Maintenance of Illegitimate Children and the Exceptio Plurium Concubentium*, 72 S. AFR. L.J. 144, 148-49 (1955).

²⁶ TEICHMAN, *supra* note 24, at 55 (describing the tradition among German tribes to impose paternity only if the alleged genetic father was of the same race and class).

²⁷ See JAMES DWYER, *THE RELATIONSHIP RIGHTS OF CHILDREN* 32-33 (2006) (stating that, in Denmark, genetic fathers are given some obligation to support, but not paternal rights, while in the Netherlands and Germany, genetic fathers have limited custodial rights); W. Craig Williams, *The Paradox of Paternity Establishment: As Rights Go Up, Rates Go Down*, 8 U. FLA. J.L. & PUB. POL’Y 261, 261-81 (1977) (demonstrating how European law often provides genetic fathers with fewer paternal rights than does United States law).

²⁸ See TEICHMAN, *supra* note 24, at 61 (“[I]n . . . [1574] a statute was framed which enabled justices to issue bastardy orders . . . whereby money could be obtained from the putative fathers of bastards.”).

²⁹ Lawrence P. Hampton, *Common Law Status of the Child*, in 1 *DISPUTED PATERNITY PROCEEDINGS* § 1.02(1)-(3) (5th ed. 1996).

morality.³⁰ There was still no scientific basis for establishing genetic connection, connection, so these suits were usually little more than “sordid spectacles” for both parties.³¹

British law did not recognize a private right of action in paternity until 1844, when mothers received the right to sue in paternity on behalf of their children.³² Only at that point did the law suggest that establishing legal fatherhood could be about something other than refilling state coffers.

In the United States, different states expressed different theories of paternity enforcement. For some, these suits were meant to provide resources for the child, while for others, they were seen as punishment for extramarital sex.³³ For still others, they were punishment for mistreatment of the mother.³⁴ In 1967, one New Jersey court summarized the law of paternity as follows: “[f]iliation statutes are generally considered to represent an exercise of the police power for the primary purposes of denouncing the misconduct involved, punishing the offender or shifting the burden of support from society to the child’s natural parent.”³⁵ The varied liability imposed reflected these differing views. Some states imposed no obligation on unwed genetic fathers,³⁶ while others mandated fixed monthly amounts.³⁷ A few states treated an unwed genetic father’s child support duty as it treated a divorced father’s child support duty,³⁸ though most states vested judges with tremendous discretion in setting child support amounts for anyone that might owe them.³⁹ Thus, treating unwed genetic fathers and marital fathers equally meant little because there was no baseline of child support from which courts operated.

³⁰ See Scholtens, *supra* note 25, at 150-51 (finding judgments that included damages for defloration as well as maintenance of the child).

³¹ HARRY D. KRAUSE, *ILLEGITIMACY: LAW AND SOCIAL POLICY* 106 (1971) (stating that paternity suits are usually “sordid spectacle[s]” for all parties involved).

³² Hampton, *supra* note 29, at § 1.02(3).

³³ Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 659 (2008) (describing the divergent theories shaping parental duty among the states until “approximately forty years ago”). Determining guilt in these situations was sometimes difficult because the woman was often seen as being at fault as well. If she led on the man, then he was not necessarily guilty enough to be ordered to support the child.

³⁴ KRAUSE, *supra* note 31, at 109 (“The criminal proceeding in which paternity is determined may be a prosecution for the crime of bastardy or fornication.”).

³⁵ *State v. M.*, 233 A.2d 65, 67 (N.J. Super. Ct. App. Div. 1967).

³⁶ See KRAUSE, *supra* note 31, at 22 (stating that Texas and Idaho did not grant illegitimate children the right to support from their fathers).

³⁷ See, e.g., FLA. STAT. § 742.041 (1951) (setting fixed monthly amounts for illegitimate children that increases with the child’s age).

³⁸ See Baker, *supra* note 33, at 659 (citing KRAUSE, *supra* note 31, at 23).

³⁹ See Nancy Thoeness, Patricia Tjaden & Jessica Pearson, *The Impact of Child Support Guidelines on Award Adequacy, Award Variability, and Case Processing Efficiency*, 25 FAM. L.Q. 325, 326-27 (1991) (discussing variability in child support awards before the adoption of guidelines and the development of child support guidelines to curtail judicial discretion).

The state of paternity law looks somewhat more uniform today, in part because of Supreme Court intervention and in part because of congressional intervention. In a series of cases decided mostly in the 1970s, the Court questioned the constitutionality of statutory distinctions between legitimate (marital) and illegitimate (nonmarital) children.⁴⁰ What emerged was a confusing and at times inconsistent doctrine, but one that suggested that the Equal Protection Clause required states to be careful in making distinctions between marital and nonmarital children when granting entitlements.⁴¹ In some contexts, the Court accepted the idea that administrative convenience justifies making distinctions between marital and nonmarital children. For instance, the Court consistently held that if a child had not established legal paternity before his or her genetic father died, that child had no right to an estate or the social welfare benefits to which the deceased's marital children might be entitled.⁴² However, the Court simultaneously held that a nonmarital child has a constitutional right to try to establish legal paternity based on genetics if his or her father is alive.⁴³ States interpreted these cases to require a DNA default for all nonmarital children.

The Court retreated from the legitimacy cases rather hastily, possibly because it realized that its decisions raised as many questions as they answered. Do the constitutional rights to a DNA default apply to children who have marital parents, just not parents to whom they are genetically related? Can children choose which parent(s) they want?⁴⁴ The Court often emphasized that

⁴⁰ See generally *Clark v. Jeter*, 486 U.S. 456, 461-65 (1988) (applying equal protection principles to state paternity law); *Mills v. Hablutzel*, 456 U.S. 91, 99-102 (1982) (same); *Lalli v. Lalli*, 439 U.S. 259, 264-76 (1978) (same); *Gomez v. Perez*, 409 U.S. 535, 535-38 (1973) (per curiam) (same); see also *Mathews v. Lucas*, 427 U.S. 495, 503-16 (1976) (applying equal protection principles to Social Security provision dealing with nonmarital children).

⁴¹ See Katharine K. Baker, *Legitimate Families and Equal Protection*, 56 B.C. L. REV. 1647, 1647-95 (2015) (explicating the legitimacy cases and suggesting that they are exceedingly difficult to reconcile with each other and with contemporary family law, particularly that pertaining to same-sex parenting and reproductive technologies).

⁴² *Lalli*, 439 U.S. at 275-76 (concluding that an illegitimate son cannot inherit from his father under New York's intestacy statute because he was never legally acknowledged by the father); *Mathews*, 427 U.S. at 516 (holding that genetic children who were not living with their genetic father when he died were not entitled to a presumption of dependency).

⁴³ See *Clark*, 486 U.S. at 463 (holding that six years is an insufficiently short statute of limitation for paternity actions); *Mills*, 456 U.S. at 99-100 (holding that a child must be given adequate time to establish paternity, and that the one-year period established by Texas law is "inadequate"); *Gomez*, 409 U.S. at 538 (concluding that Texas could not deny a nonmarital child the right to collect child support when such rights are accorded to children generally).

⁴⁴ If the child of an unwed mother has a constitutional right to sue his genetic father, why shouldn't the child of a wed mother who had an extramarital affair be entitled to the same right to establish paternity in the genetic father who is not his legal father? If the marital father has more money, can the child opt not to establish paternity in someone else? Is the choice the child's or the genetic father's or the marital father's or the mother's? Why should it matter, especially now, whether any of the potential fathers are dead? It is quite easy to establish

nonmarital children were emotionally and financially dependent on their unwed genetic fathers, just as marital children are dependent on their genetic fathers, but of course, many children are emotionally and financially dependent on adults to whom they have no genetic connection.⁴⁵ Is it the functional dependence or the genetic connection that gives rise to the constitutional right?⁴⁶ And, for cases the Court could not have foreseen in the 1970s and 1980s, what sort of rights to establish paternity do the illegitimate children of single mothers by choice have? Do children conceived with purchased ova have a right to sue their genetic mother? What if such a child has two fathers? At their core, the legitimacy cases are rooted in a heteronormative genetic parentage ideal that is at odds with more modern understandings of parenting.⁴⁷ Nonetheless the legitimacy cases led states to develop a more comprehensive, genetically based paternity law that at least tries to afford all nonmarital children the right to sue to establish paternity in a genetic father and tries to afford genetic fathers the right to establish their own paternity.⁴⁸

genetic connection with a deceased person. See RALPH C. BRASHIER, *INHERITANCE LAW AND THE EVOLVING FAMILY* 140-45 (2004) (discussing the ease of establishing a genetic connection to a deceased person and the considerable havoc it is reaping in intestacy proceedings).

⁴⁵ Dorothy Roberts has observed that parents in African-American communities often parent children to whom they are not biologically related. Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 214 (1995).

⁴⁶ In several cases the Court seemed eager to treat the children of nonmarital fathers as the children of marital fathers because the nonmarital fathers had lived with, and cared for, their nonmarital children just as marital fathers do, and the children had been dependent on them before the fathers died or got hurt. See, e.g., *Trimble v. Gordon*, 430 U.S. 762, 769 (1977). But in *Mathews v. Lucas*, 427 U.S. at 509, the Court got tangled up in its own focus on functional dependence. In that case, the Court upheld a Social Security provision that barred nonmarital children from collecting on a genetic father's account if they were not dependent on the father when he died. *Id.* at 516. The father in *Mathews* had lived with, but then abandoned, his genetic children. *Id.* at 497. The Court was willing to treat the nonmarital children worse than marital children because they were abandoned and, therefore, not dependent on him, which seems like an odd way of protecting nonmarital children's interests. See *id.* at 514-16.

⁴⁷ See Baker, *supra* note 41, at 1683-90 (discussing how elevating the importance of genetic connection, which is how many people read the legitimacy cases, is at odds with nonheteronormative parenting practices that "rely on other legal constructs rather than biology").

⁴⁸ See Leslie Joan Harris, *Reforming Paternity Law to Eliminate Gender, Status, and Class Inequality*, 2013 MICH. ST. L. REV. 1295, 1300-01 (discussing the judicial and legislative regime change that conferred certain rights on nonmarital children and fathers). There is still considerable variation in how much the marital status of the child's mother matters to the child's and the alleged genetic father's right to sue. A child whose mother was married to someone other than her genetic father would have little opportunity to sue if the mother did not want her to because the child would have no reason to know that a suit might be available. Many states still make it difficult for an alleged father to sue to establish paternity if the child already has a marital father. See *id.* at 1302 (describing the 1973 Uniform Parentage Act's statutory time limit on alleged father's ability to bring suit).

Congressional concern with the “problem” of illegitimate children centered less on the plight of the children than on how much they cost. As the number of nonmarital births continued to rise, Congress grew increasingly worried about the amount of support that nonmarital children were receiving in the form of federal welfare assistance.⁴⁹ Despite the considerable federalist history of leaving matters of family law to the states,⁵⁰ Congress began to take an active part in child support enforcement. Throughout the 1970s and 1980s, congressional programs tried to effectuate more consistent enforcement of child support orders for children receiving state aid.⁵¹ This required being able to locate the adults whom the state could make financially responsible for the child. Even with this congressional intervention, by 1989, the paternity establishment rate for nonmarital children was only thirty-one percent.⁵² It became clear that the problem was not just that child support orders were not enforced, but that many mothers had little interest in establishing legal coparentage with someone else,⁵³ and many genetic fathers had little interest in establishing a legal parent-child relationship.

Congress took it upon itself to increase the rate of paternity establishment. The Personal Responsibility and Work Opportunity Reconciliation Act, passed in 1996,⁵⁴ requires states to create a rebuttable legal presumption of paternity in anyone who acknowledges paternity.⁵⁵ Congress rewards states with high paternity establishment rates⁵⁶ and requires them to institute hospital-based programs for voluntary acknowledgements of paternity.⁵⁷ In practice, this means that before any unwed mother leaves the hospital with a newborn child, a state official has to try to secure from her and a man, if he is there, a signed affidavit

⁴⁹ *Id.* at 1304 (“In 1975 Congress established the federal-state child-support enforcement program in response to concerns about the growth in welfare rolls.”).

⁵⁰ *See* United States v. Windsor, 133 S. Ct. 2675, 2691 (2013).

⁵¹ *See* Harris, *supra* note 48, at 1304 (citing Social Service Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2337 (codified at 42 U.S.C. §§ 651-669 (2012))).

⁵² *Id.*

⁵³ In one study, a distinct minority of the women who could have pursued the unwed father in paternity chose not to do so. Esther Wattenberg, *Paternity Actions and Young Fathers*, in *YOUNG UNWED FATHERS: CHANGING ROLES AND EMERGING POLICIES* 213, 227 (Robert I. Lerman & Theodora J. Ooms eds., 1993) (finding that about one in four white unmarried parents and only one in six black unmarried parents were engaged in court adjudication of paternity).

⁵⁴ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 7, 8, 21, 25, and 42 U.S.C.).

⁵⁵ 42 U.S.C. § 666(a)(5)(B)-(C) (detailing state responsibilities to allow men to sign a VAP and the presumption of legal paternity that must accompany that acknowledgement).

⁵⁶ Jana Singer, *Marriage, Biology, and Paternity: The Case for Revitalizing the Marital Presumption*, 65 MD. L. REV. 246, 252 (2005).

⁵⁷ 42 U.S.C. § 666(a)(5)(C)(ii).

averring that the man is the father of the child.⁵⁸ The signed document, known as a Voluntary Acknowledgement of Paternity (“VAP”), is recorded with the vital records office and, if not rescinded within sixty days,⁵⁹ becomes a final legal judgment that can be challenged only on grounds of fraud, duress, or material mistake of fact.⁶⁰ Today, VAPs are the primary means of establishing parentage in children born to unwed mothers.⁶¹ The federal statute does not explicitly require that VAPs be based on genetics,⁶² but state regulations usually explicitly or implicitly make them genetically conditional.⁶³

A signed VAP makes the signatory a legal father based on his declaration that he is the genetic father, though in most cases, without genetic testing, all the man can know is whether he had the sex that might have produced the child.⁶⁴ As the legal father, he is responsible for child support and he is automatically entitled to visitation. As the legal father, he also has standing to try to demand more comprehensive custody rights.⁶⁵ In practice, many unwed genetic fathers do not secure legal custody rights and usually only visit their children with the mother’s permission. Because unwed genetic fathers have never entered into a legal relationship with the mother, they never have to go to court to dissolve it, meaning that a court does not have to be involved in the allocation of property

⁵⁸ *See id.*

⁵⁹ *Id.* § 666(a)(5)(D)(ii)(I).

⁶⁰ *Id.* § 666(a)(5)(D)(iii).

⁶¹ In 2009, 1.81 million children were born to unwed mothers and 1.17 million children had their parentage established by a VAP. *FY2009 Annual Report to Congress*, OFF. CHILD SUPPORT ENFORCEMENT (Dec. 1, 2009), <http://www.acf.hhs.gov/css/resource/fy2009-annual-report> [<https://perma.cc/7D8Q-XPT9>].

⁶² 42 U.S.C. § 666(a)(5)(C) (failing to mention genetics or genetic testing as a necessary part of acknowledging paternity).

⁶³ Most state regulation forms ask a man to swear that he is the genetic father. *See, e.g., Acknowledgement of Paternity Affidavit*, <http://www.healthandwelfare.idaho.gov/Portals/0/Health/Vital%20Records/PaternityAffidavitE.pdf> [<https://perma.cc/7DJX-4M26>] (last visited Sept. 23, 2016) (illustrating a sample VAP for Idaho); *Voluntary Acknowledgment of Parentage*, <http://www.mass.gov/dor/docs/cse/parents/voluntary-ack-of-parentage-form.pdf> [<https://perma.cc/4K4Y-H4Q7>] (last visited Sept. 23, 2016) (illustrating a sample VAP for Massachusetts). VAPs can be, though often are not, set aside even after the sixty-day period if genetic testing reveals that the signatory is not the genetic father. *See* Leslie Joan Harris, *Voluntary Acknowledgements of Parentage for Same-Sex Couples*, 20 AM. U. J. GENDER SOC. POL’Y & L. 467, 480 (2012).

⁶⁴ In most instances, without genetic testing, the mother is the only person who might know for sure who the genetic father is, and she might well not even know. Yet both men and women are routinely asked to aver to the truth of the genetic connection. The only question the VAP can expect that parties to be able to answer truthfully is whether the two signatories had sex that might have produced this child.

⁶⁵ *See, e.g., CAL. FAM. CODE* § 3010(a) (Deering 2016) (stating that both mother and father are equally entitled to custody); *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* § 2.04 (AM. LAW INST. 2000) (stating that all legal parents have a right to bring an action for custody).

or custodial rights between the adults.⁶⁶ Only if they are sued for child support, either by the mother or the state (if the mother applied for welfare benefits on behalf of the child) do these men usually make any claim for formal custodial rights. Without such a claim, the adults work out whatever joint custodial time they can agree to on their own.

Numerous contemporary commentators criticize this system as insufficiently protective of genetic fathers' rights.⁶⁷ This Article takes an entirely different, almost opposite, approach. It asks why the law should designate unwed genetic fathers as legal fathers at all. If the state were not so worried about privatizing dependencies, would the law be so concerned with finding two parents for every born child? Why should the law stop at two? Even if there is consensus that a child should have two parents, should the law use genetics to determine parentage?

II. THE DNA DEFAULT IN THEORY

This Part explores what a genetic regime treats as critical for determining parenthood (sex) and what it treats as relatively unimportant (reproductive labor). It suggests that both men who do not want to be parents and women who want to parent alone are hurt by the law's conflation of genetic and legal parenthood. This Part also examines whether highlighting genetic connection in parenthood serves children's interests, finding that there is little evidence that it does so.

A. *The Sex Police*

Imagine a contract between two unmarried adults, Beth and Bob. Bob promises to deliver to Beth a vial of his sperm, and both Bob and Beth mutually agree that Bob will not be a legal parent of any child born. This contract, express or implied, signed or oral, is enforceable under the 2002 Uniform Parentage Act ("UPA") and in all states.⁶⁸ There is no DNA default for children born with

⁶⁶ See Huntington, *supra* note 9, at 209-10 (discussing how unmarried couples do not necessarily have to go to court when they separate). Divorcing parents necessarily go to court to end their marriage and, if there are children of the marriage, a court must issue a ruling defining the custodial rights of the divorcing parents. *See id.* at 171 ("[B]ecause only the state can dissolve a marriage, marital family law presumes that couples will go to court at the end of relationships. . . . [And] [t]he court system is designed to establish co-parenting structures for a couple's postdivorce family life.").

⁶⁷ *See infra* notes 188-94 and accompanying text (discussing the status quo in which mothers have primary custody, and noting the lack of legal protection for unwed fathers).

⁶⁸ UNIF. PARENTAGE ACT § 702 (NAT'L CONFERENCE OF COMM'RS OF UNIF. STATE LAWS 2002). Some states still require a doctor to perform the artificial insemination in order for the state parentage acts pertaining to assisted reproduction to apply. *See* Susan Frelich Appleton, *Between the Binaries: Exploring the Legal Boundaries of Nonanonymous Sperm Donation*, 49 FAM. L.Q. 93, 109 (2015). Other states may override the contract if the parties function as parents after birth, even though they agreed not to be parents before birth. *See id.* at 102-04. But, all states allow contracts to govern the parentage of a child born pursuant to a clinical

purchased or donated gametes.⁶⁹ Yet, if Beth and Bob's contract was the same in all respects except the delivery of sperm—if the sperm were delivered coitally—the contract would be *unenforceable everywhere*.⁷⁰ Indeed, actions in paternity can proceed even if the sex was procured through fraud⁷¹ or under conditions that constitute statutory rape.⁷² Sex is a strict liability offense for men.

The DNA default polices sex by treating the parentage of children conceived through sex differently than the parentage of children conceived through other means. It makes all other questions that might be relevant to whether parental status should be assigned, like intent to parent, ability to parent, and willingness to coparent, irrelevant if the child was produced coitally. Given the robust constitutional protection of sexual activity,⁷³ this penalty associated with sex is striking. It is as if the state imposes a fine—twenty percent of one's income for eighteen years—for having sex with an unmarried woman.⁷⁴

nonsexual insemination.

⁶⁹ UNIF. PARENTAGE ACT, *supra* note 68, § 702 (“A donor is not a parent of a child conceived by means of assisted reproduction.”).

⁷⁰ *See, e.g.*, Budnick v. Silverman, 805 So. 2d 1112, 1113 (Fla. Dist. Ct. App. 2002) (finding a preconception contract, which agreed not to identify the genetic father in paternity, unenforceable because the “rights of support and meaningful relationship belong to the child, not the parent; therefore, neither parent can bargain away those rights”); Moorman v. Walker, 773 P.2d 887, 889 (Wash. Ct. App. 1989) (“[T]he moral responsibility for creating a human life is not voidable as if sex were a simple contractual transaction.”). Sperm donors who leave their sperm at a sperm bank routinely bargain away those rights, often for as little as seventy-five dollars per donation. Ethics Comm. of the Am. Soc’y for Reprod. Med., *Financial Compensation of Oocyte Donors*, 88 FERTILITY & STERILITY 305, 306 (2007).

⁷¹ *E.g.*, Dubay v. Wells, 506 F.3d 422, 426 (6th Cir. 2007) (stating that a woman lying about birth control does not constitute a defense to paternity); Wallis v. Smith, 22 P.3d 682, 685-86 (N.M. Ct. App. 2001) (holding that the genetic father cannot assert actions for fraud, breach of contract, or tort to recoup the financial obligations of raising his unwanted child despite girlfriend's misrepresentation about birth control); Pamela P. v. Frank S., 449 N.E.2d 713, 715 (N.Y. 1983) (explaining that considerations of the mother's “‘fault’ or wrongful conduct” is irrelevant to questions of whether genetic father can be held responsible for child support).

⁷² Males who may have had a valid statutory rape claim could still be found responsible in paternity for child support. *See, e.g.*, Cty. of San Luis Obispo v. Nathaniel J., 57 Cal. Rptr. 2d 843, 844 (Cal. Ct. App. 1996); Mercer Cty. Dept. of Soc. Serv. v. Alf M., 589 N.Y.S.2d 288, 289 (N.Y. Fam. Ct. 1992) (finding underage men responsible for child support); *In re Paternity of K.B.*, 104 P.3d 1132, 1135 (Okla. Civ. App. 2004).

⁷³ *Lawrence v. Texas*, 539 U.S. 558, 567 (2003). One might argue that the DNA default does not penalize sex; it only forces men to accept its consequences. But for men, who have no say in the decision to terminate a pregnancy, no defense to having been lied to about the possibility of consequences, and no legal right to contract around those consequences, the DNA default operates much like a penalty.

⁷⁴ The percentage of one's income that one owes in child support can depend somewhat on what the other parent earns, how many children one is responsible for, and if there are special needs; however, twenty percent of income is a good approximation of what a noncustodial parent is likely to owe for one child. *See Katharine K. Baker, Homogenous Rules*

The legitimacy cases, which initially gave rise to the increased use of the DNA default, were fueled by a belief that the legitimacy label and the marital presumption of paternity were moralistic devices, designed to punish extramarital sex by labeling nonmarital children “illegitimate.”⁷⁵ But, the DNA default is just as, if not more, moralistic than the marital presumption. Marriage assigns parentage based on a valid agreement between two adults to enter into a legal relationship requiring the sharing of many things, including parentage.⁷⁶ The DNA default assigns parentage based on the fact that two people had sex, and if the sex produced a child, there is no defense to parentage.

The UPA, adopted by many states and used as a set of guiding principles for courts in other states, makes an absolute but unexplained distinction between children produced sexually and children produced nonsexually.⁷⁷ The first six articles of the UPA treat genetic connection as the sine qua non of parenthood,⁷⁸ and suggest that science can solve all problems stemming from competing presumptions of parentage.⁷⁹ It was in following the UPA’s lead that most states included an averment of genetic connection on the VAP form,⁸⁰ and UPA comments suggest it is just a matter of time before states eliminate rules that

for Heterogeneous Families: The Standardization of Family Law When There Is No Standard Family, 2012 U. ILL. L. REV. 319, 328-31 (explaining the origins and codification of child support formulae and the reasons why, though states use different methodologies for calculating obligations, they rely on the same underlying data and therefore reach very comparable results).

⁷⁵ Indeed, states trying to maintain their right to treat marital and nonmarital children differently originally defended the legitimacy distinction on those moralistic grounds. *See Glona v. Am. Guarantee & Liab. Ins. Co.*, 391 U.S. 73, 75 (1968) (dismissing state claims that legitimacy classifications helped discourage nonmarital sex); *Levy v. Louisiana*, 391 U.S. 68, 70 (1968).

⁷⁶ In all states in the United States, money earned during a marriage is considered joint property, subject to equitable division between the spouses if they get divorced. *See Baker*, *supra* note 74, at 333-35.

⁷⁷ UNIF. PARENTAGE ACT, *supra* note 68, § 701 cmt. (“Article 7 applies only to children born as the result of assisted reproduction technologies; a child conceived by sexual intercourse is not covered by this article . . .”).

⁷⁸ *See id.* § 201(a)(1) (stating the mother-child relationship is established by “the woman’s having given birth to the child”). The UPA does include one section that allows equitable principles to trump genetic connection if a paternal presumption is being challenged. *Id.* § 608(a)(2) (stating the court may deny a motion to seek an order for genetic testing if “it would be inequitable to disprove the father-child relationship between the child and the presumed or acknowledged father”). But this provision seems at odds with other provisions of the Act. *See infra* notes 79-81.

⁷⁹ UNIF. PARENTAGE ACT, *supra* note 68, § 204 cmt. at 15 (“[T]he existence of modern genetic testing obviates [the] old approach to the problem of conflicting presumptions when a court is to determine paternity. Nowadays, genetic testing makes it possible in most cases to resolve competing claims to paternity.”).

⁸⁰ *Id.* § 301 cmt.

limit the extent to which the marital presumption of paternity can be questioned by genetic fathers.⁸¹

Articles 7 and 8 of the UPA, which “[do] not apply to the birth of a child conceived by means of sexual intercourse,”⁸² treat parentage wholly differently. Parentage for children conceived nonsexually is assigned based on intent, consent, and suitability of the parties for parenting.⁸³ One might expect some explanation for why the means of conception requires an entirely different set of rules to determine parentage, but the UPA does not provide any. Interestingly, Article 7 contemplates numerous instances in which the conceived child would have only one parent: when an unmarried woman uses donor sperm,⁸⁴ when a husband does not consent to his wife’s post-divorce artificial insemination,⁸⁵ or in a situation in which a husband’s original consent to artificial insemination has been voided by divorce or formally withdrawn.⁸⁶ “In th[ese] instance[s], intention, rather than biology, is the controlling factor.”⁸⁷ The fiscal concerns

⁸¹ See *id.* § 607 cmt. at 47 (“Not that long ago, some states imposed an absolute bar on a man commencing a proceeding to establish his paternity if state law provides a statutory presumption of the paternity of another man. It is increasingly clear that those days are coming to an end.” (citing *Michael H. v. Gerald D.*, 491 U.S. 110 (1989))). This comment misstates the law as it applied in *Michael H.* The California statute allowed the putative father to try to establish his paternity if he had the consent of the mother. See *Michael H.*, 491 U.S. at 116 (“The presumption may be rebutted by blood tests, but only if a motion for such tests is made . . . either by the husband or, if the natural father has filed an affidavit acknowledging paternity, by the wife.”).

⁸² UNIF. PARENTAGE ACT, *supra* note 68, § 701. The UPA treats children born of what it calls “assisted reproduction,” *id.* art. 7, somewhat differently than children born pursuant to “gestational agreement,” *id.* art. 8. The Act imposes more formalities on contracts for gestational services than on contracts for gametes. Given the extraordinary importance the Act puts on gametes in its first six articles, this somewhat cavalier treatment of them in Article 7 might have given the drafters pause. Nonetheless, both Articles 7 and 8 determine parentage primarily with reference to the intent and consent of the potential parties. See, e.g., *id.* § 703 (“A man who provides sperm for, or consents to, assisted reproduction by a woman as provided in Section 704 with the intent to be the parent of her child, is a parent of the resulting child.”); *id.* § 801(b) (“The man and the woman who are the intended parents must both be parties to the gestational agreement.”).

⁸³ See *id.* § 703 cmt. (declaring the donor is a parent if he “provide[d] sperm . . . with the intent to be the parent of her child”); *id.* § 704(a) (“Consent by a woman, and a man who intends to be a parent of a child born to the woman by assisted reproduction must be in a record signed by the woman and the man.”); *id.* § 802 cmt. (“The purpose of early involvement is to ensure that the parties are appropriate for a gestational agreement, that they understand the consequences of what they are about to do, and that the best interests of a child born of the gestational agreement are considered before the arrangement is validated.”). Another comment simultaneously acknowledges that for children conceived through sexual intercourse, parentage is established “irrespective of the alleged intent of the parties.” See *id.* § 701 cmt.

⁸⁴ See *id.* § 702 cmt.

⁸⁵ See *id.* § 706 cmt. at 66.

⁸⁶ See *id.* § 706 cmt. at 67.

⁸⁷ *Id.*

that first gave rise to the DNA default, with its insistence on two potential sources of support, disappear if a child is conceived nonsexually.

The UPA's unaddressed but stark distinction between sexual and nonsexual reproduction is reflected in the case law. Preconception intent almost always governs the parentage question for children conceived noncoitally, but never governs for children conceived through intercourse.⁸⁸ *Ferguson v. McKiernan*⁸⁹ lays out the issue nicely, stating that there is a "common-sense distinction between reproduction via sexual intercourse and the non-sexual clinical options for conception."⁹⁰ The mother in *Ferguson* entered into an oral agreement with her former sexual partner where he would donate sperm for her use for in vitro fertilization.⁹¹ She had previously undergone tubal ligation surgery and could not conceive sexually, and she promised not to sue him in paternity.⁹² She gave birth to twins, and when the twins were five-years-old, she sued him for child support.⁹³ By that time, he had married someone else with whom he had a child in the marriage.⁹⁴

The trial, appellate, and supreme courts of Pennsylvania all found the agreement not to establish paternity valid as a contract, but relying on case law involving sexually produced children, the lower courts found the contract unenforceable as it was against public policy.⁹⁵ The Supreme Court of Pennsylvania reversed:

[T]wo potential cases at the extremes of an increasingly complicated continuum present themselves: dissolution of a relationship (or a mere sexual encounter) that produces a child via intercourse, which requires both parents to provide support; and an anonymous sperm donation, absent sex, resulting in the birth of a child. These opposed extremes produce two distinct views that we believe to be *self-evident*. In the case of traditional sexual reproduction, there simply is no question that the parties to any resultant conception and birth may not contract between themselves to deny the child the support he or she requires. . . . In the institutional sperm donation case, however, there appears to be a growing consensus that

⁸⁸ See *In re R.C.*, 775 P.2d 27, 35 (Colo. 1989) (reviewing commentary and case law and concluding preconception intent is appropriate standard for nonsexual conception); Katherine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL'Y 1, 28-30 (2004) (summarizing the intent standard as used in courts in cases involving nonsexual reproduction); see also Susan Frelich Appleton, *Exploring the Legal Boundaries of Nonanonymous Sperm Donation*, 48 FAM. L.Q. 93, 94 (2015) (describing the binary sexually produced and nonsexually produced children).

⁸⁹ 940 A.2d 1236 (Pa. 2007).

⁹⁰ *Id.* at 1245 (emphasis added).

⁹¹ *Id.* at 1239.

⁹² *Id.*

⁹³ *Id.* at 1240.

⁹⁴ *Id.* at 1241.

⁹⁵ *Id.* at 1238.

clinical, institutional sperm donation neither imposes obligations nor confers privileges upon the sperm donor.⁹⁶

The court did not explain the “self-evident” and “common-sense” distinction between sexually and nonsexually produced children any more than the UPA does, but it did use an intent standard to determine parenthood and find the contract enforceable.⁹⁷

The way the court reached its result is as telling as its ultimate holding. First, like both lower courts, the highest court found it necessary to describe the parties’ previous sexual relationship, even though that previous sexual relationship was irrelevant to how the twins were conceived.⁹⁸ Had the parties not had a previous sexual relationship, there would have been no question as to the contract’s enforceability. Why did the past sexual relationship matter? It seems likely that the judges were just too unnerved by the recognition that if the sex between these parties had produced a child, no contract, or fraud, or mistake, would have eliminated the sexual partner’s responsibility to parent. In fact, the mother in this case had lied to her sexual partner repeatedly about whether she was using birth control; the court found her “inexplicably” duplicitous in dealing with him,⁹⁹ but none of those lies would have mattered if she had subsequently sued him to establish the paternity of a sexually conceived child.¹⁰⁰

Second, the court well understood that to find paternity in this instance would put at risk the reproductive choices of “[a]n increasing number of would-be mothers who find themselves either unable or unwilling to conceive and raise children in the context of marriage [who] are turning to donor arrangements.”¹⁰¹ The Supreme Court of Pennsylvania imposed single motherhood on the plaintiff in this case because it was concerned about all the other recipients of sperm who were single mothers by choice.¹⁰² This policy judgment is wholly consistent with with a parentage regime based on intent, but not at all consistent with a regime that is so concerned with privatizing dependency that it holds men strictly liable for sexually produced children.

Finally, the court in *Ferguson* noted that true solicitude for children’s interests requires taking into account the defendant sperm donor’s marital child, “who . . . did not ask to be born into this situation, but whose interests would suffer,” if the contract were not enforced.¹⁰³ Understanding that adults often have other children who will be impacted by findings of parentage seems like a

⁹⁶ *Id.* at 1246 (emphasis added).

⁹⁷ *Id.* at 1248.

⁹⁸ *Id.* at 1239-40.

⁹⁹ *Id.* at 1239.

¹⁰⁰ *See supra* note 71 and accompanying text (discussing that wrongful conduct of the mother is irrelevant to whether a genetic father can be held responsible for child support of a sexually conceived child).

¹⁰¹ *Ferguson*, 940 A.2d at 1245.

¹⁰² *Id.* at 1247.

¹⁰³ *Id.* at 1248.

straightforward proposition. One's ability to provide, emotionally and materially, for any one child depends in part on how many other children one has. Yet, the recognition that assigning parentage to a particular adult for the benefit of one child may well have a negative impact on other children whom that adult parents is a concern that the Supreme Court and all courts determining the parentage of sexually produced children regularly ignore.¹⁰⁴

When a child is not produced sexually, courts contemplate different kinds of equities, including those involving sperm donors who were lied to, those involving women who may not want a coparent, and those involving existing children who may be harmed by an assignment of paternity. The most important factor in determining parenthood is usually the intent of the adults with regard to parenthood. In other words, something like a contract (albeit with a healthy dose of equitable review) governs. Intent and the other factors that seem so obviously important when a child is conceived nonsexually lose all significance when a child is produced sexually because, apparently, it is so self-evident that the law should regulate sex.

B. *Women's Reproductive Labor*

Relying on the DNA default to determine legal parentage for children born as a result of sex also erases the legal importance of women's reproductive labor. Men and women who have sex that results in a child are, at the child's birth, similarly situated with regard to their genetic connection to the child, but usually not with regard to any other kind of investment, sacrifice, or decision-making about that child's existence. Common parlance tends to refer to genetic fathers as "biological fathers,"¹⁰⁵ but as every biologist knows, human genetic progenitors, like all mammalian genetic progenitors, have very different biological relationships to their children at birth.

As a biological matter, genetic mothers who conceive through intercourse have invested more in their genetic issue at birth than have genetic fathers for two reasons. First, the female gamete is much bigger than the male gamete, and women use many more resources to produce one egg than men use to produce one sperm. Second, the female gamete provides the food reserves that the fertilized egg initially needs to grow.¹⁰⁶ Those food reserves are just as essential

¹⁰⁴ In several of the Supreme Court's legitimacy cases, the Court spoke as if it was coming to the defense of all children, but it was more often just forcing existing marital children to share whatever estate or government benefits were at issue. *See Baker, supra* note 41, at 1663 (explaining how in "protecting" the rights of illegitimate children to benefits, a statute or court is often forcing legitimate children to share more than they otherwise would have to).

¹⁰⁵ *Biological Father*, COLLINS ENG. DICTIONARY, <http://www.collinsdictionary.com/dictionary/english/biological-father> [<https://perma.cc/5BHP-XK8P>] (last visited Sept. 23, 2016) (defining "biological father" as a genetic father); *see also Biological Parent*, RANDOM HOUSE DICTIONARY, <http://dictionary.reference.com/browse/biological-parent> [<https://perma.cc/UST7-7PQ8>] (last visited Sept. 23, 2016) (defining "biological parent" as a genetic parent).

¹⁰⁶ RICHARD DAWKINS, *THE SELFISH GENE* 141-42 (1976).

to the reproduction process as is the genetic parents' DNA, but the female gamete, and only the female gamete, has those food reserves.¹⁰⁷ Thus, even though any child shares equal amounts of genetic material from both male and female parents, the gamete containing the mother's genetic material is far more resource intensive and more precious than the male gamete.

Because of the work it takes to produce each egg, women cannot produce as many eggs as men do sperm. Sperm and egg are thought of as comparable investments because they have comparable genetic allotments, but markets reflect a very gendered difference between female and male gametes. The American Society for Reproductive Medicine suggests that \$5000 is an appropriate price to pay for several eggs, while men get paid between sixty and seventy-five dollars for many more sperm.¹⁰⁸ Modern science and modern markets make clear that sperm and eggs are different in important ways—ways that suggest that in providing her gamete, a female is providing much more to the fertilization process than is the male.

Even more important, the work that goes into making a fertilized egg into a human being is exclusively female and—unless she chooses to terminate the pregnancy—mandatory for the birth mother.¹⁰⁹ Carrying a pregnancy to term is work. It is physical, often exhausting work,¹¹⁰ and it is emotional work that can be debilitating or exhilarating, or both.¹¹¹ It is work that comes with an extensive list of medical treatments, recommendations, and restrictions on one's activities. It is work that fathers never do.¹¹² This means at birth, pursuant to almost any

¹⁰⁷ See D.L. Dufour & M.L. Sauther, *Comparative and Evolutionary Dimensions of the Energetics of Human Pregnancy and Lactation*, 14 AM. J. HUM. BIOLOGY 584, 585-86 (2002).

¹⁰⁸ Ethics Comm. of the Am. Soc'y for Reprod. Med., *supra* note 70, at 308. Many women get compensated above the \$5000 mark as well. See Brooke Edwards, *The High Cost of Giving Up Your Eggs*, NYU LIVEWIRE (Apr. 30, 2007), http://journalism.nyu.edu/publishing/archives/livewire/archived/high_cost_eggs/ [<https://perma.cc/9JCF-JTL8>] (suggesting that the going rate for egg donation in New York City was \$8000 and in California certain egg donors got paid as much as \$25,000).

¹⁰⁹ See Owen D. Jones, *Sex, Culture and the Biology of Rape: Toward Explanation and Prevention*, 87 CALIF. L. REV. 827, 849-50 (1999) (explaining the differences between male and female minimum parental investment).

¹¹⁰ See, e.g., Vern L. Katz, *Prenatal Care*, in DANFORTH'S OBSTETRICS AND GYNECOLOGY 1, 1-21 (Ronald S. Gibbs et al. eds., 10th ed. 2008); Kristen J. Lund & James McManaman, *Normal Labor, Delivery, Newborn Care, and Puerperium*, in DANFORTH'S OBSTETRICS AND GYNECOLOGY, *supra*, at 22, 22-34; Deborah Krakow, *Medical and Surgical Complications of Pregnancy*, in DANFORTH'S OBSTETRICS AND GYNECOLOGY, *supra*, at 276, 276-310.

¹¹¹ See generally LOUIS E. GENEVIE & EVA MARGOLIES, THE MOTHERHOOD REPORT: HOW WOMEN FEEL ABOUT BEING MOTHERS 100-09 (1987) (summarizing survey results regarding women's feelings on pregnancy); Mary E. Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133, 142-52 (1992) (discussing women's feelings regarding "the emotional meaning of mothering").

¹¹² Becker, *supra* note 111, at 142.

metric except a genetic one, a woman who gestated a child has invested much more in the child than has a genetic father.¹¹³

This description of women's reproductive contributions may invite critiques of gender essentialism, maternalism, and disregard for the importance of degendered parenting. Admittedly, there is a long history of using biological differences between men and women as an excuse for discriminatory treatment of women.¹¹⁴ But to assume, as the DNA default encourages us to, that genetic contribution constitutes the essence of parentage is to ignore all of the nongenetic work of reproducing, and the assumption does not even capture the qualitatively different male and female gamete investment.¹¹⁵ If a gender equality imperative compels the law to treat genetic mothers and fathers as similarly situated at birth,¹¹⁶ then women's reproductive labor is reduced—legally—to a labor of love, which is how the law has always justified not compensating for the work that women do.¹¹⁷ Ignoring and discounting the “female” work that women have traditionally done has played just as important a role in institutionalizing gender discrimination, as has highlighting women's biological differences.¹¹⁸

At times, the Supreme Court has recognized and rewarded women's disproportionate reproductive investment in children. In two abortion decisions,

¹¹³ If a genetic father has been solely responsible for a pregnant woman's food, shelter, protection, and medical care than he probably has a claim to comparable investment. Today, more than any time in history, though, pregnant women are especially unlikely to be so dependent on the genetic father of their children. Most women, particularly nonwealthy women, provide as much if not more for their own and their developing fetuses as to their sexual partners. *See supra* note 111 and accompanying text.

¹¹⁴ *See Muller v. Oregon*, 208 U.S. 412, 422-23 (1908) (upholding different treatment of men and women because “[t]he two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, . . . and in the capacity to maintain the struggle for subsistence”).

¹¹⁵ Of note here is how much data supports the notion that, particularly in the low-income communities in which the DNA default is most applicable, women start changing their behavior “overnight” when they learn they are pregnant, while men who find out that their girlfriends are pregnant almost never change their behavior that quickly. *See infra* notes 214-15 and accompanying text.

¹¹⁶ *See Lehr v. Robertson*, 463 U.S. 248, 250 (1983); *Stanley v. Illinois*, 405 U.S. 645, 646 (1972).

¹¹⁷ *See Katharine Silbaugh, Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 36-54 (1996) (exploring the numerous ways in which courts and governmental programs routinely treat women's domestic labor as freely given or an act of love, not work for which they might be entitled to compensation).

¹¹⁸ *Id.* at 6 (“[T]he legal treatment of women's unpaid labor disadvantages women.”); *see also* Mary E. Becker, *Obscuring the Struggle: Sex Discrimination, Social Security, and Stone, Seidman, Sunstein and Tushnet's Constitutional Law*, 89 COLUM. L. REV. 264, 267-69 (1989) (detailing how traditional treatment of women's inequality fails to address how women's work is routinely ignored as work); Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571, 1589-1605 (1996) (explaining how the failure to tax housework bars women from the kind of wage protections that men enjoy).

the Court focused on the biological differences between men and women during gestation to vest the right to terminate a pregnancy in the gestational mother, not in both genetic progenitors of the fetus. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹¹⁹ the Court wrote: “[i]t is an inescapable biological fact that state regulation with respect to the child a woman is carrying will have a far greater impact on the mother’s liberty than on the father’s.”¹²⁰ In *Planned Parenthood of Central Missouri v. Danforth*,¹²¹ the Court found that the mother must have the right over the genetic father to determine the course of the pregnancy because she is “more directly and immediately” affected by it.¹²²

In the unwed father cases, decided in the 1970s and 1980s, the Court addressed whether a genetic connection to a child gave an unwed father constitutional rights to fatherhood. The men in most of these cases argued both that (1) their genetic connection gave them a right to some process before the state summarily vested paternity in someone else, and (2) they had the right to be treated as the genetic mothers of the children were treated as a matter of sex equality doctrine. The court resolved both claims in a comparable manner. The weight of both rights is dependent on the extent of the genetic father’s relationship with the child.¹²³ As a due process matter, the more established a genetic father’s relationship with a child, the weightier his interest.¹²⁴ As an

¹¹⁹ 505 U.S. 833 (1992).

¹²⁰ *Id.* at 896.

¹²¹ 428 U.S. 52 (1976).

¹²² *Id.* at 71 (“The obvious fact is that when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail [and] [i]nasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor.”).

¹²³ Thus, while the legitimacy cases suggest that a child of an unwed mother has a constitutional right to establish a legal parent-child relationship to his genetic father, a genetic father does not necessarily have a reciprocal right to establish a legal parent-child relationship to his genetic offspring. For instance, a genetic connection per se, gives a man no constitutional paternal rights if the mother is married to someone else because the law can vest fatherhood in the husband of the mother. See *Michael H. v. Gerald D.*, 491 U.S. 110, 129-30 (1989). If the mother is unmarried, the genetic father has some process rights although they are not particularly robust. See *Lehr v. Robertson*, 463 U.S. 248, 261 (1983). In *Lehr*, the Court sanctioned the use of a putative father registry, which gave every man who thought he might be genetically related to a child the ability to register with the state so that if the state took action with regard to that child, the state would notify the putative father. *Lehr*, 463 U.S. at 248-52. The Court found that *Lehr*’s failure to register in the state’s unwed father registry voided any right he might have had to block the adoption of his genetic child by another man. *Id.* at 264-65. *Lehr* had no relationship with the two-year-old child when he tried to block the adoption. *Id.*

¹²⁴ Compare *Stanley v. Illinois*, 405 U.S. 645, 649 (1972), in which the Court found that the state had to provide the unwed genetic father of three children with whom he had lived all their lives with the right to a hearing before the state could assume wardship over the children, with *Quilloin v. Walcott*, 434 U.S. 246, 256 (1978), in which the Court found that the unwed father who had had no contact with his nonmarital child did not have the right to veto the adoption of that child by another man.

equality matter, the more established the relationship with the child, the more he is similarly situated to the mother.¹²⁵ The relationship, not genetic connection, gives rise to constitutional rights for fathers.¹²⁶ At birth, a genetic father has no relationship with the child. The Court has also used biological differences between men and women during gestation and at birth to condone the automatic conferral of citizenship on the genetic children of American mothers, but not necessarily the genetic children of American fathers.¹²⁷

Many scholars have criticized the unwed father and citizenship cases as rooted in gender stereotypes and maternalism.¹²⁸ Far fewer scholars criticize the abortion decisions on gender equality grounds; but if equality norms should be used to override women's much greater biological investment in a newborn child, then it is not altogether clear why equality norms should not be used to give genetic progenitors equal rights to a child before it is born. Stated differently, why should a woman's disproportionate investment in a newborn

¹²⁵ *Lehr*, 463 U.S. at 267-68 (“Whereas [the mother] had a continuous custodial responsibility for Jessica, [the father] never established any custodial, personal, or financial relationship with her.”). The dissimilarity of situation stems from the relationship the mother develops with a child in utero. As the born child matures, and the father develops his own relationship with the child, the mother and the father become similarly situated for sex equality purposes. See *Caban v. Mohammed*, 441 U.S. 380, 394 (1979) (finding that an unwed father who had a relationship with his children was similarly situated to the mother).

¹²⁶ The Court has never resolved whether a genetic father has a right to a particular kind of hearing. The strength of his constitutional rights depends on whether the hearing is something like a fitness hearing, in which genetics would entitle him to the status of father unless the state could prove him, by clear and convincing evidence, unfit, see *Santosky v. Kramer*, 455 U.S. 745, 768-69 (1982), or a “Best Interest of the Child” hearing, in which a judge would be choosing between possible fathers based only on what the judge thought would be in the child's best interest. For a discussion of how courts approach these issues, see Deborah H. Wald, *The Parentage Puzzle: The Interplay Between Genetics, Procreative Intent, and Parental Conduct in Determining Legal Parentage*, 15 AM. U. J. GENDER SOC. POL'Y & L. 379, 399-405 (2007).

¹²⁷ See *Flores-Villar v. United States*, 564 U.S. 210, 210 (2011) (affirming the statutory rule that vests citizenship in children whose genetic mother is a U.S. citizen, but not necessarily in foreign-born children whose genetic father is an citizen), *aff'g mem. by an equally divided court*, 536 F.3d 990 (9th Cir. 2008); *Nguyen v. INS* 533 U.S. 53, 58-60 (2001); *Miller v. Albright*, 523 U.S. 420, 424 (1998).

¹²⁸ For an example of criticism of the unwed father cases, see Melanie B. Jacobs, *My Two Dads: Disaggregating Social and Biological Paternity*, 38 ARIZ. ST. L.J. 809, 830-37 (2006) (arguing against exclusive parenthood and for recognition of biological and legal fathers). For examples of criticism of the citizenship cases, see Kerry Abrams & R. Kent Piacenti, *Immigration's Family Values*, 100 VA. L. REV. 629, 705-06 (2014) (stating that citizenship cases rely on a “rigid notion of biological sex and outdated and stereotypical conceptions of fathering”); Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134, 2205 (2014) (arguing that treatment of foreign-born children in citizenship law was shaped by “maternalist norms” regarding mother and father relationships with nonmarital children).

child become immediately irrelevant at birth when that disproportionate investment is so obviously relevant to the abortion decision?¹²⁹

In sum, when it comes to parental rights, not child support, the Supreme Court has endorsed a vision of legal parenthood as rooted in something more than just genetics. This explains why women have the exclusive right to make the abortion decision and why, despite the fact that a fetus shares an equal genetic connection with both genetic mother and father, the Court has been comfortable vesting the birth mother with greater rights at birth.

The DNA default and Congress's attempt to privatize all children's dependencies by imposing parenthood on all genetic parents ignores the privileged position that the Supreme Court has allowed birth mothers to enjoy. Women who apply for state aid are compelled to name a genetic father.¹³⁰ Unmarried women who give birth in a hospital are visited by state agents, who ask them to name the genetic fathers.¹³¹ There are plenty of instances of women misidentifying the genetic father, either purposefully or accidentally,¹³² but no state agent tells the new mother she has the right to not name anyone as the father,¹³³ unless the mother tells the state agent that she used a sperm donor; then the state agent goes away.¹³⁴ Just as genetic fathers can be free of child support burdens if a child with their sperm is produced nonsexually, so a woman is free

¹²⁹ Those who might argue that the law can afford the genetic father rights once the child is born without impacting the mother may not understand how the law of parenthood works. A woman who does not want to be a mother is not free to relinquish her parental rights if the legal father does not let her. Just as a mother can sue a man in paternity even if he does not want to be a parent, so to a man can assume custody of child and force the birth mother to retain her legal status as mother. For a discussion, see Katharine K. Baker, *Property Rules Meet Feminist Needs: Respecting Autonomy by Valuing Connection*, 59 OHIO ST. L.J. 1523, 1565-68 (1998).

¹³⁰ See 42 U.S.C. §§ 651-669 (2012) (outlining procedures pursuant to which states can recoup funds from any noncustodial parent by a custodial parent applying for aid).

¹³¹ See *id.* § 666(a)(5)(C)(ii) (requiring hospital-based programs to establish paternity).

¹³² See Harris, *supra* note 48, at 1330-35 (discussing cases of VAPs in which a man acknowledged genetic paternity when, in fact, he was not the genetic father).

¹³³ *Id.*

¹³⁴ 42 U.S.C. § 666(a)(5)(C)(i)-(iii), (D)(ii); *supra* notes 57-60 and accompanying text; see also Harris, *supra* note 48, at 1340 (noting that states give child support exceptions for insemination situations); Singer, *supra* note 56, at 266-67 (explaining that "a substantial number of states have enacted statutes providing that a sperm donor is not the legal father"). I have first-hand knowledge of this process. A state social worker approached me in the hospital after the birth of my first child. She already knew that I was unmarried (presumably because of a box I checked when I was admitted the hospital) and she informed me that I had to name the child's father. I had been teaching family law for eight years at that point and was confident that I was more familiar with both Illinois and constitutional law than was she. But, when I challenged her on whether I had to fill out the form, she said I had to in order to protect my child. I then engaged her in a discussion of sperm banks and she acknowledged that in that situation I would not have to name a father. She could not explain why.

to parent alone if her child is produced nonsexually.¹³⁵ Neither freedom is afforded to men and women who produced a child by having sex.

C. *Children's Interest in the DNA Default*

Given family law's general interest in protecting the best interests of children, one might think that the DNA default is rooted in solicitude for children. Some lawmakers probably assume that children have a strong interest in being raised by their genetic parents. Neither history nor contemporary data strongly supports this assumption. Up through the eighteenth century, genetic parents of all but the wealthiest classes routinely fostered their genetic children out and took other children in.¹³⁶ Family status was based on with whom one lived rather than to whom one was genetically related.¹³⁷ In his study of the family, John Gillis notes that it was not until the twentieth century that mothers were assumed to be responsible for *all* of their genetic issue.¹³⁸ Only then did middle class families develop an expectation of living with and guiding all of their genetic children through their teenage years.¹³⁹ Abandonment of one's genetic issue did not become morally suspect until the mid-nineteenth century, when, as Signe Howell writes, genetics "was made the locus for moral responsibility" for children.¹⁴⁰

It is worth remembering how recent our attachment to genetics is because, as Clifford Geertz reminds us, the ways in which people are defined "are not given in the nature of things—they are historically constructed, socially maintained, and individually applied."¹⁴¹ The DNA default grew out of a desire to take responsibility for children away from the collective and place it on individual adults.¹⁴² It thus enabled a "characterization of humans as autonomous individual beings,"¹⁴³ such that genetics are seen as much more essential to who

¹³⁵ See Baker, *supra* note 129, at 1545-46.

¹³⁶ JOHN R. GILLIS, *A WORLD OF THEIR OWN MAKING: MYTH, RITUAL, AND THE QUEST FOR FAMILY VALUES* 153-55 (1996) (describing how prior to the twentieth century, children often did not live with their genetic parents due to high fertility rates, high prevalence of wet nursing, comparatively short maternal life spans, as well as other factors and suggesting, as a result, motherhood and maternity did not converge until children lived with their biological mothers).

¹³⁷ See *id.* at 155-56 ("Only in this century has maternity come to bear all the weight of the symbolic as well as practical meanings that were once attached to all who mothered rather than to the one particular person who gave birth.").

¹³⁸ *Id.* at 154-55.

¹³⁹ *Id.*

¹⁴⁰ Signe Howell, *Changes in Moral Values About the Family: Adoption Legislation in Norway and the US*, 50 *SOC. ANALYSIS* 146, 150-51 (2006).

¹⁴¹ CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 363-64 (1973).

¹⁴² See GILLIS, *supra* note 136, at 155 ("This change followed the general shift in thinking of parenting as an individual rather than a collective responsibility, one best carried out by one set of parents rather than several.").

¹⁴³ Howell, *supra* note 140, at 150.

we are than are our “sociality and kinship” networks.¹⁴⁴ This existential autonomy is not universal. Many other “societies perceive the person in terms of group identification.”¹⁴⁵ Dorothy Roberts has suggested that African-Americans in this country have long perceived their own identity in less genetic and more social terms.¹⁴⁶

The idea that children’s interests are best protected when they are raised by their genetic parents was recently dismissed by all of the federal appellate courts that found a constitutional right to same-sex marriage, none of which found merit in the argument that states need to protect children’s interest in being raised by their married biological parents. Judge Posner wrote, without apparent need for explication, that “[t]he state recognizes that family is about raising children and not just about producing them.”¹⁴⁷ Same-sex parents can raise children just as well as opposite-sex parents, found the vast majority of courts that considered the issue, even though same-sex parents cannot both be genetically related to their children.

Defining parentage in terms of genetics marginalizes children in nongenetic families. Commentators critique contemporary law for marginalizing “unwed” families and nonmarital relationships,¹⁴⁸ but a reification of genetics marginalizes just as a reification of marriage does. The DNA default inevitably edifies a two-parent heterosexual family and diminishes any family structure not mimicking that ideal. Among those who are “other” in a regime in which the DNA default goes unquestioned are (1) adoptees, particularly transracial children, whose lack of a genetic link to their parents is often clear to third parties, (2) any child of a single parent by choice, and (3) any child of a same-

¹⁴⁴ *Id.*

¹⁴⁵ See Rochelle Cooper Dreyfuss & Dorothy Nelkin, *The Jurisprudence of Genetics*, 45 VAND. L. REV. 313, 316 (1992).

¹⁴⁶ Roberts, *supra* note 45, at 231-35 (“[T]he primary threat to the Black community posed by the social emphasis on the genetic tie . . . is the biological justification of white supremacy.”).

¹⁴⁷ *Baskin v. Bogan*, 766 F.3d 648, 663 (7th Cir. 2014); see also *Latta v. Otter*, 771 F.3d 456, 471 (9th Cir. 2014) (dismissing arguments that same-sex couples’ failure to produce genetically related children should affect their right to marry because “marriage is not simply about procreation”); *Bostic v. Schaefer*, 760 F.3d 352, 383 (4th Cir. 2014) (citing data showing that same-sex—nongenetically related—couples parent just as well as opposite-sex genetically related couples); *Kitchen v. Herbert*, 755 F.3d 1193, 1220-22 (10th Cir. 2014) (dismissing the argument that failure to be able to produce genetically related children justifies restricting same-sex couples from marrying).

¹⁴⁸ See Huntington, *supra* note 9, at 205-10 (suggesting that the law does not extend its helpful mediating institutions to “unwed families” and it privileges marriage); Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 367-78 (2011) (describing historical and ongoing stigmas associated with illegitimacy); Melissa Murray, *What’s So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL’Y & L. 387, 436 (2012) (suggesting that the marriage equality movement has engendered a new illegitimacy that privileges marital child-rearing above all other forms of child-rearing).

sex couple. Rooted as it is in genetic essentialism, exclusion, and heteronormativity, the DNA default is a far more serious roadblock to same-sex parenting, single-parent families, and multiple-parent families than is marriage. It is the perception that parenthood might be anything other than a legal construct, a bundle of rights and obligations that originate in law, which poses the greatest danger to pluralistic family forms.

Being raised by genetic parents does help ensure that children have knowledge of genetic information that could affect their own medical treatment, and it may play a role in children's sense of their own identity.¹⁴⁹ But genetic science will likely soon render the former inconsequential,¹⁵⁰ and the importance of genetic identity to psychological health is much debated.¹⁵¹ There are a variety of cultures in which fatherhood is not seen as at all essential until adolescence, and then only for boys.¹⁵² Growing evidence suggests that children

¹⁴⁹ See *id.* at 686-90 (discussing the role of identity theory in adoption and artificial insemination cases).

¹⁵⁰ Robert F. Service, *The Race for the \$1000 Genome*, 311 SCI. 1544, 1544-46 (2006) (suggesting that inexpensive genome analysis will soon do a much better job of predicting medical risks and personalizing medicine).

¹⁵¹ The "Open Adoption" movement, which in the 1970s and 1980s helped transform the legal adoption process, was motivated by a belief that children who did not know their genetic parents suffered a sense of "genealogical bewilderment." See generally H.J. Sants, *Genealogical Bewilderment in Children with Substitute Parents*, 37 BRITISH J. MED. PSYCHOL. 133 (1964) (describing genealogical bewilderment in adoptees). Open Adoption encouraged reforms that allowed adopted children to search for their genetic parents, and encouraged genetic parents to maintain ties with their genetic issue, and, as a result, many more adoptees today have some contact with their genetic parents, especially their genetic mother. See Ulrich Müller & Barbara Perry, *Adopted Persons' Search for and Contact with Their Birth Parents I: Who Searches and Why?*, 4 ADOPTION Q. 5, 9-10 (2001) (suggesting that many adopted individuals search for and contact their birth parents, and citing studies that showed more adoptees were interested in meeting their birth parents in 1991 than in 1980). There is a gendered quality to genealogical bewilderment that undermines the idea that the DNA default is important for children's identity needs. Interviews with adoptees strongly suggest that the yearning to know one's genetic origins manifests itself more often in a desire to know one's genetic mother than one's genetic father, so much so that scholars have used the term "immaculate conception" to describe many adoptees' sense of their own origins. See BETTY JEAN LIFTON, *JOURNEY OF THE ADOPTED SELF: A QUEST FOR WHOLENESS* 191 (1994); Kristine Freeark et al., *Gender Differences and Dynamics Shaping the Adoption Life Cycle: Review of the Literature and Recommendations*, 75 AM. J. ORTHOPSYCHIATRY 86, 95 (2005). Whether the greater identification with the mother is the result of the social construction of the importance of motherhood, or whether it is some combination of social and biological factors, it strongly suggests that it is not the missing genetic link, per se, that creates the sense of bewilderment.

¹⁵² William V. Fabricius et al., *Custody and Parenting Time: Links to Family Relationships and Well-Being After Divorce*, in *THE ROLE OF THE FATHER IN CHILD DEVELOPMENT* 201, 207 (Michael E. Lamb ed., 5th ed. 2010) (explaining how the impact of father absence is culturally contingent; if there is not a norm for the father to be there, boys do not attribute the genetic father's absence to his lack of caring).

in the African-American community, which tends to be more accepting of single motherhood, are relatively unaffected by father absence.¹⁵³

More important, while there is ongoing debate about the importance to both adoptees and children born with donated or purchased gametes to know their genetic progenitors,¹⁵⁴ the DNA default is about assigning parentage, with its full complement of rights and obligations. Even if it is important for children's senses of identity to know whom their genetic progenitors are, it does not follow that genetic progenitors should be assigned legal status as parents.¹⁵⁵

* * *

The analysis above suggests that the DNA default imposes questionable burdens on men, women, and children. It polices sexual activity by assigning parentage in ways that render everything but the fact that sex happened irrelevant to parentage. It prevents women from parenting alone if they want to, and it legally negates women's greater biological contribution to newborn children. The DNA default also imports a binary heterosexual parenting norm that inevitably marginalizes children whose family structures fall outside that norm.

III. THE DNA DEFAULT IN PRACTICE

The DNA default's prevalence might be justified on more practical grounds: at least it provides children with two parents. Children have material and emotional needs that parents are charged with meeting. The law needs some means of assigning parentage. Perhaps the DNA default is just the best option. This Part looks at the practical ramifications of using the DNA default. First, it

¹⁵³ Kari Adamsons & Sara K. Johnson, *An Updated and Expanded Meta-Analysis of Nonresident Fathering and Child Well-Being*, 27 J. FAM. PSYCHOL. 589, 597 (2013) ("Among non-White mothers who see nonresident fathering as more 'optional,' a lack of involvement might be less detrimental to children's well-being . . ."). Cultural acceptance of nonresidential fatherhood may lead to greater paternal involvement. Genetic African-American fathers tend to maintain longer term contact with their genetic children by visiting with regularity and have better relationships with the children's mothers than do white fathers. See Lerman & Sorenson, *supra* note 16, at 148-50 (finding that in the two to six years after their children were born, thirty percent of nonmarital African-American fathers visited them at least once per week, while only about fifteen percent of white fathers saw their nonmarital children as frequently in the same time frame).

¹⁵⁴ Compare Naomi Cahn, *The New Kinship*, 100 GEO. L.J. 367, 384 (2012) (discussing possible harm of genetic bewilderment in donor children), with Cohen, *Rethinking Sperm-Donation Anonymity*, *supra* note 4, at 431-45 (responding to Cahn, and arguing that the "identity" harm to children born with donated gametes, if extant, is likely relatively small and outweighed by advantages to the children of being born and to the intended parents and others).

¹⁵⁵ Cahn argues that the United States, like many countries in Europe, should eliminate the practice of anonymous sperm donation, but she does not argue that sperm donors should be treated as legal parents. See Cahn, *supra* note 154, at 411-16 (suggesting a registry of gamete donors).

looks at how effectively the DNA default transfers resources to needy children. Second, it looks at the nonpecuniary aspects of parenting to see if there are other benefits to the law treating genetic progenitors as parents.

A. *The DNA Default and Child Support*

The DNA default makes the genetic progenitors of a child liable for child support. Since the early 1990s, as part of the congressional effort to alleviate the federal welfare burden, all states have been required to develop comprehensive, easily applied, income-based formulae for determining child support liabilities.¹⁵⁶ What a parent owes in child support is a function of his income, and of what an econometric model predicts that someone at his and the other parent's income level would spend on a child if the two parents lived together in one household.¹⁵⁷

The methodological problems with these formulae are legion,¹⁵⁸ and there are strong arguments that for divorcing couples the models under assess an appropriate child support award.¹⁵⁹ For purposes of this Article, though, the most most glaring limitations are reciprocal ones. The formulae and the judges who apply them over assess child support awards for unwed genetic fathers because they determine the obligation based on a household norm that does not exist, and they assume income that many unwed genetic parents do not have.

Many genetic progenitors do not have enough money to establish their own household. Some live with their own parent(s) or other relatives.¹⁶⁰ Even when genetic progenitors do live together after the child is born, they are often sharing

¹⁵⁶ Adoption of the formulae was one of the conditions that Congress imposed on states to try to alleviate the federal government's welfare burden. See Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2346 (codified as amended at 42 U.S.C. § 667(b) (2012)); 45 C.F.R. § 302.56(c)(1)-(2), (h) (2016).

¹⁵⁷ See generally Baker, *supra* note 74, at 329-31 (explaining child support formulae).

¹⁵⁸ See *id.* at 340-46 (critiquing the formulae). See generally Ira Mark Ellman, *Fudging Failure: The Economic Analysis Used to Construct Child Support Guidelines*, 2004 U. CHI. LEGAL F. 167 (discussing the numerous flaws in the econometric models used to create child support formulae, including the use of averages in the data despite large variations, as well as the use of equivalency scales that presume one can make reliable assessments of spending patterns by looking at only a few selected expenditures).

¹⁵⁹ See Baker, *supra* note 74, at 341 (questioning why the formulae should be so deferential to the nonresidential parent); Ellman, *supra* note 158, at 210-12 (indicating that the models likely underestimate expenditures on children in higher income families); Marsha Garrison, *Autonomy or Community? An Evaluation of Two Models of Parental Obligation*, 86 CALIF. L. REV. 41, 92-117 (1998) (arguing that a communitarian model that is not so solicitous of the earner's right to control his or her earnings should be used for child support purposes).

¹⁶⁰ See KATHRYN EDIN & LAURA LEIN, MAKING ENDS MEET: HOW SINGLE MOTHERS SURVIVE WELFARE AND LOW-WAGE WORK 58-64 (1997) (discussing living arrangements of low-income parents); JUDITH STACEY, IN THE NAME OF THE FAMILY: RETHINKING FAMILY VALUES IN THE POSTMODERN AGE 40-45 (1996) (discussing inability of low-income and working-class men to support traditional households).

those homes with other adults.¹⁶¹ Together, the genetic parents do not make enough money to pay rent on their own. Thus, the model is based on an ideal that is beyond the reach of many of its subjects.

Even if genetic progenitors can afford to live together alone, the costs of living apart are greater. So, once they are not living together, they are often spending more money on basic living expenses for themselves than they would be if they were living together. Two households cost more than one.¹⁶² Thus, while a parent might be able to devote twenty percent of his income to his child if he were living with the child's other parent and sharing living costs, a noncustodial parent often cannot afford to support himself if he is forced to pay twenty percent of his income to the custodial parent of his child.¹⁶³

When judges attempt to apply these flawed formulae, they often just make the situation worse. Faced with an unemployed or underemployed noncustodial parent, judges will estimate an income for him and then order him to pay a portion of it.¹⁶⁴ For instance, judges may assume that a man can earn minimum wage for forty hours a week.¹⁶⁵ In communities with entrenched unemployment, this is an unrealistic expectation, but failing to meet the judge's expectations often has dire consequences. Federal regulations require states to develop comprehensive child support enforcement mechanisms.¹⁶⁶ In response, some states have implemented civil contempt sanctions, including revoking drivers' licenses, which can limit a man's ability to maintain or find employment.¹⁶⁷ Other states use criminal contempt sanctions, and incarcerate men who repeatedly fail to pay what they owe.¹⁶⁸ While in prison, the men's obligation grows and their employability declines.¹⁶⁹ In many cases, a vicious cycle develops: underemployment leads to an inability to pay, which leads to punishments that make finding and maintaining employment more difficult,

¹⁶¹ See EDIN & LEIN, *supra* note 160, at 24 ("In most cases, the welfare-reliant families who shared housing with a friend or relative were able to split the rent, utilities, telephone bill, and other household expenses.").

¹⁶² See Baker, *supra* note 74, at 341 (observing that child support formulae "ignore[] . . . the economies of scale reaped by two adults living together").

¹⁶³ Twenty percent is an approximation of what most models require a noncustodial parent to pay in child support. See *id.* at 331 n.86.

¹⁶⁴ Ann Cammett, *Deadbeats, Deadbrokes, and Prisoners*, 18 GEO. J. ON POVERTY L. & POL'Y 127, 143 (2011) ("[S]ome courts actually 'impute' income to a parent by supplying the court's judgment of what their earning capacity should be, rather than actual earnings.").

¹⁶⁵ *Id.* ("Most states impute income based on full-time work at the minimum wage . . .").

¹⁶⁶ *Id.* at 137-38.

¹⁶⁷ *Id.* at 130 ("A wide range of very serious sanctions, such as onerous salary garnishment, driver's license suspension, re-incarceration, and many others can be triggered against parents when they are released.").

¹⁶⁸ Maria Cancian, Daniel R. Meyer & Eunhee Han, *Child Support: Responsible Fatherhood and the Quid Pro Quo*, 635 ANNALS AM. ACAD. POL. & SOC. SCI. 140, 149 (2011).

¹⁶⁹ Cammett, *supra* note 164, at 129 ("Prisoners are also parents, and in many states they amass huge child support arrears during a period of incarceration.").

which leads to even less ability to pay, which leads to even greater child support arrears.

Somewhat unintentionally, the real beneficiaries of the federal effort to overhaul child support collection may have been women who were never that likely to receive federal aid. Middle- and upper-class women, who were traditionally awarded extensive custody, but received erratic, highly discretionary, and under-enforced child support awards have benefited from the federal push to normalize child support awards and enforcement. Divorcing fathers used to contest reasonable child support awards much more successfully¹⁷⁰ and effectively evade enforcement by moving across state lines if they did not approve of the award.¹⁷¹ The formulae diminished the efficacy of the first strategy¹⁷² and federal legislation facilitating intrastate enforcement of child support orders greatly reduced the efficacy of the second.¹⁷³

That federal legislation, coupled with political efforts to demonize the nonpaying noncustodial parent as a “deadbeat dad” probably did help shift child support norms so that it is now much less socially acceptable than it once was for divorced fathers to underpay. Most noncustodial parents pay what they owe voluntarily.¹⁷⁴ But that story of norm transformation is largely irrelevant to the twenty-six percent of noncustodial parents who live in poverty,¹⁷⁵ eighty-eight percent of whom do not pay child support.¹⁷⁶ It is these men who owe the vast amount of unpaid child support,¹⁷⁷ and they are not paying what they owe because they do not have it. As others have noted, the money spent on enforcement against these men would likely be better spent directly on

¹⁷⁰ See Nancy Thoennes, Patricia Tjaden & Jessica Pearson, *The Impact of Child Support Guidelines on Award Adequacy, Award Variability, and Case Processing Efficiency*, 25 FAM. L.Q. 325, 326-27 (1991) (explaining how judges have wide discretion in determining child support awards before the guidelines).

¹⁷¹ For an explanation of the difficulties in interstate enforcement prior to the Uniform Interstate Family Support Act, see generally LESLIE HARRIS, LEE E. TEITELBAUM & JUNE R. CARBONE, FAMILY LAW 807-24 (4th ed. 2010).

¹⁷² See Thoennes, Tjaden & Pearson, *supra* note 170, at 341 (“Most of the judges and attorneys we surveyed thought the passage of guidelines had led to more voluntary stipulations on child support and fewer contested cases.”).

¹⁷³ See HARRIS, TEITELBAUM & CARBONE, *supra* note 171, at 813-14 (describing federal legislation facilitating interstate enforcement of child support obligations).

¹⁷⁴ Leslie Joan Harris, *Reconsidering the Criteria for Legal Fatherhood*, 1996 UTAH L. REV. 461, 476.

¹⁷⁵ Tonya L. Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families*, 15 J. GENDER RACE & JUST. 617, 646 (2012) (“About twenty-six percent of noncustodial fathers (about 2.8 million) are poor, and the vast majority of this group (approximately eighty-eight percent) does not pay any child support.”).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 649 (“No- and low-income parents are responsible for the greatest portion of unpaid child support . . .”).

children.¹⁷⁸ In other words, trying to enforce the pecuniary side of fatherhood, which has always been the motivating principle for the DNA default, has minimal economic impact on the children it is trying to help.

Whether the DNA default serves nonpecuniary purposes is harder to evaluate. Section III.B evaluates contemporary genetic fatherhood in the communities in which the DNA default has the most salience. It suggests that notwithstanding numerous recent scholarly proposals to reinvigorate father's rights in low-income communities, the DNA default is no more able to provide effectively for children emotionally, than it is to provide for them financially. In practice, the DNA default does not work.

B. *The DNA Default and Custodial Rights*

The vast majority of unwed genetic fathers are aware of their genetic children's existence.¹⁷⁹ An unwed mother usually tells the man whom she thinks is the genetic father that she is pregnant soon after she finds out. Eighty percent of unwed fathers are still romantically involved with the mother when the child is born.¹⁸⁰ This is in part why the VAP campaign has been so successful. Most of these men visit the mother in the hospital right after birth.¹⁸¹ They are in close enough contact with the mother that it is fairly easy to get them to "acknowledge" paternity.¹⁸² Half of unwed genetic fathers even live with the mother at the time the child is born.¹⁸³

Numerous commentators point to these romantic relationships between genetic mothers and fathers as proof that fathers should be considered coparents at birth.¹⁸⁴ Relying on recent empirical and ethnographic work, done particularly

¹⁷⁸ See HARRIS, TEITELBAUM & CARBONE, *supra* note 171, at 484 (suggesting the costs saved from the end of child-support enforcement could be used to expand public assistance to families with children); Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, 81 NOTRE DAME L. REV. 325, 351-52 (2005) (describing how increased child support enforcement has not reduced child poverty for families on welfare because the money that gets collected does not go to the children unless the amount is greater than what the custodial parent would receive in welfare benefits, which is rare).

¹⁷⁹ See Lerman & Sorenson, *supra* note 16, at 146.

¹⁸⁰ Sara S. McLanahan & Irwin Garfinkel, *Fragile Families: Debate, Facts, and Solutions*, in MARRIAGE AT THE CROSSROADS: LAW, POLICY, AND THE BRAVE NEW WORLD OF TWENTY-FIRST-CENTURY FAMILIES 142, 145 (Marsha Garrison & Elizabeth S. Scott eds., 2012).

¹⁸¹ *Id.* at 145-46.

¹⁸² See 42 U.S.C. § 666(a)(5)(C)(ii) (2012) (requiring states to establish "a hospital-based program for the voluntary acknowledgment of paternity focusing on the period immediately before or after the birth of a child").

¹⁸³ McLanahan & Garfinkel, *supra* note 180, at 145 (noting that fifty percent of unmarried parents live together at the time of their child's birth).

¹⁸⁴ See *id.* at 144 (contending that some scholars argue nonmarital childbearing is not a problem because unmarried parents are just like married parents except for the marriage license); *supra* note 10 (arguing that unwed fathers should be treated more like wed fathers

in inner city, low-income communities in which nonmarital birth is the norm, these authors emphasize that most unwed genetic fathers are not deadbeat dads who blithely ignore their genetic children.¹⁸⁵ Many of these men profess strong desires to be a part of their genetic children's lives.¹⁸⁶ The romantic relationship between mother and father rarely lasts, but these men say that they want to stay connected to their children.¹⁸⁷

Combining these assessments of unwed genetic couples with data showing that children of divorce benefit from meaningful, loving relationships with both parents after divorce, scholars argue that the law of parenthood deprives unwed fathers and their children of relationships that could and should be beneficial to them. Thus, Clare Huntington argues that both genetic parents should have a right to legal and physical custody at birth and that genetic fathers should have custody orders in place immediately after birth.¹⁸⁸ While not fully endorsing a presumption of shared parenting time, Solangel Maldonado argues that by not legislating shared parenting time, the law wrongly endorses a status quo in which mothers have primary custody.¹⁸⁹ Sociologists Kathryn Edin and Timothy Nelson note the lack of legal protection for unwed fathers' interests in their children and argue that "[i]f we truly believe in gender equity, then we must find a way to honor fathers' attempts to build relationships with their children."¹⁹⁰

In a series of articles and a book, Merle Weiner suggests that the law should adopt a new status, the "parent-partner status," which would exist apart from marriage.¹⁹¹ The status would be mandatory for all genetic parents of sexually produced children, and would impose a series of rights and obligations vis-à-vis each other and for the sake of the child.¹⁹² In a similar vein, Mayeri argues that

because they have comparable romantic relationships with mothers at birth).

¹⁸⁵ See, e.g., Murphy, *supra* note 178, at 353 ("[M]any of the men owing child support are in fact dead broke.").

¹⁸⁶ See Lerman & Sorenson, *supra* note 16, at 145.

¹⁸⁷ More than ninety-five percent of genetic fathers that cohabitate with the mother at the time of birth provide some financial support and visit the mother in the hospital. McLanahan & Garfinkel, *supra* note 180, at 145-46. More than seventy percent of genetic fathers who were no longer romantically involved with the mother said they wanted to help raise their child. *Id.* If these men have signed a VAP, as most of them have, they have standing to go to court to secure more visitation time or custodial rights if they feel they are being unfairly denied custodial time, but most do not. See Huntington, *supra* note 9, at 205.

¹⁸⁸ Huntington, *supra* note 9, at 170, 227.

¹⁸⁹ Maldonado, *supra* note 10, at 633.

¹⁹⁰ EDIN & NELSON, *supra* note 10, at 227.

¹⁹¹ WEINER, *supra* note 12, at 133.

¹⁹² *Id.* ("[T]he parent-partner status would automatically impose obligations between parents that would last throughout their child's minority. The parents' mutual obligations would arise upon the birth . . . of their child."). The obligations would include a duty to aid, a duty not to abuse, a duty to work on the relationship at the transition to (just) parenthood from conjugality, a duty of good faith and fairness, and a duty to give care or share. See *id.* at 135; Merle H. Weiner, *Thinking Outside the Custody Box: Moving Beyond Custody Law to Achieve*

in combatting what she calls “marital supremacy,” the state must support nonmarital conjugal unions.¹⁹³ Robin Lenhardt suggests that in recognizing modern parenthood the law “find[] unmarried black couples with children, in particular, where they are.”¹⁹⁴ While not as specific as Weiner, both Mayeri and Lenhardt seem to assume that a child born as the result of a conjugal union—to a “couple”—should be legally recognized as the child of both members of that “couple.”

This Section argues that these scholars and the law should be more careful in assigning a designation of parent and/or family. To call adults who have had sex “parents” because they had sex that produced a child, or to assume that they should be considered “family” because they attempted to live together once, asks the law to respect and fortify many relationships that are exceedingly unlikely to survive. It assumes that adults are going to be able to support and respect each other because the law says they should. The law is not that powerful.¹⁹⁵ There is a significant difference between asking people who have never been willing to commit to or trust each other to do so because their conjugal relationship produced a child, and asking people who have been willing to cooperate, trust, and respect each other in the past, to try to maintain parts of that relationship for the sake of children.

In the context of divorce, that is, when the custody dispute is between two people that have previously decided to commit to each other legally, to live together, have a child together, and jointly raise that child for a period time, law reform efforts have been quite successful in helping former spouses transition to substantially equal shared parenting time and joint custody arrangements.¹⁹⁶ Joint custody has been made successful for a significant portion of divorcing

Shared Parenting and Shared Custody, 2016 U. ILL. L. REV. 1536, 1572.

¹⁹³ Serena Mayeri, *Marriage (In)equality and the Historical Legacies of Feminism*, 6 CALIF. L. REV. CIR. 126, 134 (suggesting that the state must recognize nonmarital relationships that produce children). Mayeri coined the term “marital supremacy” in an earlier article. See Mayeri, *supra* note 14, at 1279 n.2 (defining “marital supremacy” as the “legal privileging of marriage over non-marriage, and marital over nonmarital families”).

¹⁹⁴ Robin A. Lenhardt, *Marriage as Black Citizenship?*, 66 HASTINGS L.J. 1317, 1357 (2015) (assuming that the “fragile black famil[y]” is the genetic family).

¹⁹⁵ To be fair, both Huntington and Weiner acknowledge that norms of cooperation and respect, not just legal requirements, will be critical to their proposals. See WEINER, *supra* note 12, at 199 (explaining that a supportive coparenting relationship based on cooperation and respect after a breakup is important to children); Huntington, *supra* note 9, at 224. They suggest that the law must foster those norms for nonmarital couples. See WEINER, *supra* note 12, at 228 (stating that the law should influence the social norms surrounding a parent-partner relationship by communicating societal expectations to society members); Huntington, *supra* note 9, at 224 (suggesting that a new theoretical framework for legal regulations will lead to different legal rules, institutions, and social norms). But the ability of the law to foster those norms between people who have been unwilling to commit to each other legally is questionable. See *infra* text accompanying notes 251-268.

¹⁹⁶ See Huntington, *supra* note 9, at 237 (stating that family law goes to great lengths to protect the involvement of both parents following a divorce).

couples by: (1) a growing recognition that marital dissolution need not, and should not, be as adversarial as once thought; (2) an increasing commitment to mediation and counseling for joint custody arrangements; and (3) the breakdown of gender roles in marriages, so that joint decision-making and joint physical custody after divorce better mimic the life that the parties had when the marriage was intact.¹⁹⁷ As Marsha Pruett and Herbie DiFonzo conclude, there is “widespread agreement among professionals that children generally have improved prospects after separation and divorce when they have healthy, loving relationships with two parents before and after separation and divorce.”¹⁹⁸ They also note that the “[s]ocial science research strongly supports shared parenting . . . when both parents agree to it.”¹⁹⁹ The scholars who endorse equal parental rights at birth for unwed parents usually point to the success of these shared parenting arrangements as proof that children and their genetic fathers would benefit from legal presumptions or strong nudges toward more equal parenting time.²⁰⁰

However, a more complete analysis of the joint custody data suggests that the likelihood of successful coparenting is exceedingly low for most of the parents impacted by the DNA default. As Pruett and DiFonzo explain, the data on joint parenting is more nuanced than many acknowledge.²⁰¹ The feasibility of joint parenting and the benefits it may provide for children are almost completely dependent on parents’ ability to cooperate. Indeed, robust empirical evidence suggests that “whether the mother and the father can effectively cooperate as coparents has emerged as an important, if not the most important, determinant of a child’s ultimate level of wellbeing.”²⁰² Various researchers list common factors as essential for effective joint custody agreements. These include effective communication between the parents, cooperation, equality of negotiating power, and trust.²⁰³ Among the variables that contraindicate joint

¹⁹⁷ CARBONE & CAHN, *supra* note 1, at 127-28 (describing increasing public and state acceptance of joint custody for divorcing couples).

¹⁹⁸ Marsha Kline Pruett & J. Herbie DiFonzo, *Closing the Gap: Research Policy, Practice, and Shared Parenting*, 52 FAM. CT. REV. 152, 159 (2014).

¹⁹⁹ *Id.* at 154 (explaining that shared parenting consists of frequent, continuing, and meaningful contact).

²⁰⁰ See Huntington, *supra* note 9, at 232-33 (suggesting mediation centers be established to help unwed parents navigate joint parenting); Maldonado, *supra* note 10, at 634 (advocating a legal requirement of joint parenting plans for unwed parents).

²⁰¹ See Pruett & DiFonzo, *supra* note 198, at 153-54 (explaining that the data does not support the notion that joint custody is always appropriate).

²⁰² Jeffrey T. Cookston et al., *Effects of the Dads for Life Intervention on Interparental Conflict and Coparenting in the Two Years After Divorce*, 46 FAM. PROCESS 123, 134 (2006) (citation omitted). The father’s relationship with the mother consistently emerges as the most important variable in whether the father can maintain a significant relationship with his children. See NANCY E. DOWD, REDEFINING FATHERHOOD 3 (2000) (stating that the strength of the father’s paternal involvement with his children prior to divorce is not as important as his ongoing relationship with the mother).

²⁰³ Nancy Ver Steegh & Dianna Gould-Saltman, *Joint Legal Custody Presumptions: A*

custody are conflict between the parties, rigid arrangements, safety concerns, and children under age four.²⁰⁴

It is very difficult to find the qualities and criteria that experts consider essential for shared custody in the communities in which most low-income unwed genetic parents live, and it is quite easy to find the variables that contraindicate joint custody. To explore why, one needs to dive into the empirical work of Sara McLanahan at the Fragile Families Project, who has been collecting data on low-income nonmarital child-rearing situations for over twenty years²⁰⁵ and the ethnographies of Kathryn Edin, who, with two different coauthors, Maria Kefalas and Timothy Nelson, has produced magnificent studies of parenthood in the inner city.²⁰⁶ These two datasets, one quantitative, one qualitative, provide most of the evidence upon which the legal scholars writing about the plight of unwed genetic fathers rely.²⁰⁷ The data shows genetic fathers and mothers attempting to be loving, sympathetic genetic parents, but it also reveals relationships between adults that are steeped in distrust, minimal mutual respect, and strong resistance to any kind of interdependence.

Troubling Shortcut, 52 FAM. CT. REV. 263, 264 (2014). Australia implemented an impressive comprehensive program to decrease adversarial custody arrangements, including significant expenditures on mediation for parties of all income levels; the data from the program suggests that joint custody works, but only among parents who “respect each other as parents, who cooperate, who can avoid or contain conflict when they communicate, who can compromise, and who have arrangements that are child-focused and flexible.” Bruce Smyth et al., *Legislating for Shared-Time Parenting After Parental Separation: Insights from Australia?*, 77 LAW & CONTEMP. PROBS. 109, 112 (2014). Not surprisingly, these arrangements work best for parents with higher incomes, who live near each other, and have flexible work hours. *Id.* at 111-12. A significant number of cases in Australia must contain one or more of these disqualifying variables, because even with all of the mediation help, the number of families who maintain joint physical custody agreements has stabilized at around fifteen percent. *Id.* at 130.

²⁰⁴ Smyth et al., *supra* note 203, at 141 (explaining which variables reduce the success of joint custody).

²⁰⁵ See Sara McLanahan et al., *Unwed Fathers and Fragile Families 1* (Ctr. for Research on Child Wellbeing & Fragile Families, Working Paper No. 98-12, 1998), <http://crcw.princeton.edu/workingpapers/wp98-12-FF-McLanahan.pdf> [<https://perma.cc/X4PJ-2WX7>]; *About the Fragile Families and Child Wellbeing Study*, FRAGILE FAM. & CHILD WELLBEING STUDY, <http://www.fragilefamilies.princeton.edu/about> [<https://perma.cc/LZ9E-WFT6>] (last visited Sept. 17, 2016).

²⁰⁶ See generally KATHRYN EDIN & MARIA KEFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE (2005); EDIN & NELSON, *supra* note 10.

²⁰⁷ Cahn and Carbone, Huntington, Lenhardt, Maldonado, and Weiner all rely on the work from the Fragile Family Project and Edin. See CARBONE & CAHN, *supra* note 1, at 73; HUNTINGTON, *supra* note 12, at 41, 104; WEINER, *supra* note 12, at 26, 42; Lenhardt, *supra* note 194, at 1349-50; Maldonado, *supra* note 10, at 633, 636.

Unlike married couples who usually jointly plan for children,²⁰⁸ pregnancy for most low-income women is rarely a result of a decision to have a child.²⁰⁹ Instead it is the result of a semimutual assessment of the couples' level of "togetherness"—which marks the time at which they cease using condoms.²¹⁰ While approximately half of unwed genetic parents are cohabiting at the time of birth (another thirty-two percent are romantically involved),²¹¹ most move in together because of the pregnancy.²¹² The decision to move in together is not experienced as an expression of commitment to each other.²¹³

Living together tends to exacerbate problems in the relationship because women view it as a time to test the man's ability to parent. Pregnant women transform themselves overnight "for the sake of the baby";²¹⁴ genetic fathers do not. Indeed, a genetic father's "drinking and drugging" often gets worse and his frequent "brazen infidelities," about which he is often less than truthful, breeds tremendous disdain and distrust.²¹⁵ While the birth itself acts as a kind of "magic moment,"²¹⁶ during which past misdeeds are forgiven and hope for the future allows both men and women to sign the VAP with ease, "the speed at which couples break up only reflects the essential truth of these relationships—that beneath the façade of family-like ties, these men seldom have a strong

²⁰⁸ See CARBONE & CAHN, *supra* note 1, at 128 ("For college graduates, two-parent relationships arise from planning [and] [t]hey remain likely to marry before they give birth; disputes over paternity are relatively rare.").

²⁰⁹ EDIN & NELSON, *supra* note 10, at 53 (reporting that only fifteen percent of low-income pregnancies are planned, as reported by Philadelphia and Camden fathers).

²¹⁰ *Id.* at 24 (explaining how the decision to stop using condoms is often meant to convey a level of sexual fidelity—which decreases the risk of STD transmission—rather than a desire to have a child).

²¹¹ See Sara McLanahan et al., *Strengthening Fragile Families*, BROOKINGS (Oct. 26, 2010), <https://www.brookings.edu/research/strengthening-fragile-families/> [<https://perma.cc/MH2X-JLKG>].

²¹² EDIN & NELSON, *supra* note 10, at 41 n.27 ("[S]ome of these couples live together before conception, but a good number of them enter cohabitation 'shotgun.'").

²¹³ From the genetic fathers' perspectives, "[t]he women who bear [their] children seem to be indistinguishable from others that they 'get with' but don't happen to become pregnant." *Id.* at 30.

²¹⁴ EDIN & KEFALAS, *supra* note 206, at 53. "[T]he way in which a young woman reacts in the face of a pregnancy is viewed as a mark of her worth as a person." *Id.* at 43. Motherhood has a "transforming influence, leading them to abandon their 'drinking and drugging.'" *Id.* at 184.

²¹⁵ See *id.* at 58, 89, 93; EDIN & NELSON, *supra* note 10, at 76 ("[T]here is no denying that the men typically 'rip and run' a lot before the baby comes and are far less likely than the mothers of their children to stay on the straight and narrow after the birth."). The drinking and infidelity often breeds distrust. See EDIN & KEFALAS, *supra* note 206, at 93, 126; EDIN & NELSON, *supra* note 10, at 112 ("[A] strong current of mistrust . . . pervades these relationships from start to finish.").

²¹⁶ EDIN & KEFALAS, *supra* note 206, at 7-8.

attachment to their children's mothers."²¹⁷ The couple "emerge[s] from the euphoria of the delivery room only to find they have astoundingly little in common."²¹⁸ By the time the child is old enough to benefit from shared custody—experts agree that significant sharing of custody before age four is harmful to a child²¹⁹—half of both unwed genetic mothers and fathers have produced another child with another partner, thus greatly exacerbating tensions and jealousies in the original couple.²²⁰

The mothers are well aware of how weak the attachment is between the genetic parents. It is that recognition that makes mothers reject any kind of dependence on genetic fathers, even if the parents do move in together. Mothers assume one hundred percent of the provider role for themselves and their

²¹⁷ EDIN & NELSON, *supra* note 10, at 77.

²¹⁸ *Id.* at 78.

²¹⁹ Smyth et al., *supra* note 203, at 141; *see also* Pruett & DiFonzo, *supra* note 198, at 161-62 (asserting that the benefits of shared custody can be reduced or reversed if a child is too young).

²²⁰ *See* McLanahan & Garfinkel, *supra* note 180, at 152, 154 (reporting that forty-five percent of genetic mothers and forty-seven percent of genetic fathers have another child by the time their first child is five years old and that blended families have more problems than traditional two-parent families). Forcing adults to mediate equal parenting time with multiple ex-partners and their genetic children—if it is even logistically possible—is not likely to work in practice. *See id.* at 154 (“[J]ealousy is a serious problem for many unmarried couples, and mothers often object to fathers spending time with children in other households because it means spending time with the children’s mothers.”) Researchers in this area acknowledge the instability problems associated with multipartner fertility. *See* EDIN & NELSON, *supra* note 10, at 186-209 (discussing norm of serial fatherhood and the tensions that grow between ex-partners when new partners arrive); Huntington, *supra* note 9, at 201 (discussing conflicting loyalties with multipartner fertility); McLanahan & Garfinkel, *supra* note 180, at 153 (stating that partnership instability reduces the quality of both genetic parents’ parenting).

Many children in these situations will inevitably feel abandoned by genetic fathers who cannot maintain meaningful parenting relationships with all of their children. These children might be less likely to feel abandoned, though, if they did not assume that their genetic progenitor was supposed to be their father. Because of different single parenthood norms in the African-American community, African-American children already feel less abandoned by their genetic fathers than do most white and Latino children. *See supra* note 153 and accompanying text. If the law is not going to stop genetic fathers from having more genetic children than they can meaningfully parent, at least it can stop those men from being the legal parents of children who will feel abandoned by their absence. Children conceived with purchased sperm and raised by single mothers usually refer to their sperm provider as a “donor.” *See Discussing Donor Conception*, SPERM BANK CAL., <https://www.thespermbankofca.org/content/discussing-donor-conception-your-child-0> [<https://perma.cc/V3SC-67RP>] (last visited Sept. 23, 2016) (listing recommended sources on how to explain sperm donation to one’s child). They may be curious about his existence, but they do not mistake him for a father. *See* Baker, *supra* note 38, at 688-89 n.194 (comparing the difference between the sense of abandonment that some adoptees feel with the curiosity that children conceived with donated gametes express).

children.²²¹ Being able to rely completely on her own earnings is what a woman feels gives her the leverage to demand better behavior from a potential partner.²²² More important, it helps ensure that the state will not take her child.²²³ The male progenitors accept—and view as inevitable—the mother’s complete responsibility for the child’s material and emotional needs.²²⁴ “[S]he, he and the community at large assign her—not them—ultimate parental responsibility.”²²⁵

Joint custody and more equal shared parenting after divorce were ideas born at a time when mainstream culture and the law were trying to eradicate or minimize traditional gender roles in parenting. Today, *marital* gender roles have become far less rigid.²²⁶ Most men in modern marriages profess far less allegiance to traditional male prerogatives,²²⁷ but Edin and Kefalas observe that low-income men are a “notable exception”²²⁸ to this belief in egalitarianism. Carbone and Cahn write:

The new gender bargain on which these relatively egalitarian norms rest[] does not reflect working-class realities. The identification of marriage with

²²¹ See EDIN & KEFALAS, *supra* note 206, at 81. Mothers will accept support, in kind or in cash, from a child’s genetic father and they do not necessarily demand that fathers pay what the state says they owe. Edin and Kefalas report that when the couple stays together, the mother does not demand that the father pay what his state-imposed obligation would be, *id.* at 69-70, and almost twenty-five percent of custodial parents who do not have a child support order say they did not file because they feel the other parent could not afford to pay it. See HARRIS, TEITELBAUM & CARBONE, *supra* note 171, at 543 (citing TIMOTHY S. GRALL, U.S. CENSUS BUREAU, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2005, at 5 (2007), <https://www.census.gov/prod/2007pubs/p60-234.pdf> [<https://perma.cc/9HGK-3T9L>]). Still, being able to provide for their children is part of how mothers define parenthood. They see it as an essential part of their role as parent and they believe a worthy father should see it comparably. EDIN & KEFALAS, *supra* note 206, at 79. As one mother said, “[t]hat’s what being a family is—you have to bring a *paycheck* home.” *Id.* at 77.

²²² See EDIN & KEFALAS, *supra* note 206, at 203-04 (arguing that poor single women want to reach their economic goals on their own because she can “follow through on her threat to leave [a potential partner] without being ‘left with nothing’”).

²²³ EDIN & NELSON, *supra* note 10, at 120.

²²⁴ See *id.* at 18 (stating that genetic fathers believe that “being there,” not providing financial support or discipline, is their most important job).

²²⁵ *Id.* at 81. Genetic fathers often want to be friends to their children, as Edin and Nelson note, “this definition of fatherhood leaves all of the hard jobs—the breadwinning, the discipline, and the moral guidance—to the moms.” *Id.* at 18.

²²⁶ See CARBONE & CAHN, *supra* note 1, at 93 (“[Modern marriage] rests on a new social script . . . [of] interdependence . . . [and] assumes commensurate contributions; . . . [p]erhaps most critically, though, it assumes joint responsibility—for both the family’s finances and any resulting children.”).

²²⁷ See Richard J. Harris & Juanita M. Firestone, *Changes in Predictors of Gender Role Ideologies Among Women: A Multivariate Analysis*, 38 SEX ROLES 239, 240 (1998) (indicating that education level (which correlates with marriage likelihood) and participation in the labor force correlate with belief in gender equity for both men and women).

²²⁸ See EDIN & KEFALAS, *supra* note 206, at 117, 203 (noting that the low-income men in their studies believe in “traditional sex roles”).

interdependence and sharing not only fails to express the implicit terms of working-class relationships; it ties it to a script that assumes two adults making comparable, if not always equal, investments in the relationship.²²⁹

Unwed genetic fathers and mothers in the low-income communities that have been studied do not come close to making comparable investments in their children.

Nonetheless, scholars calling for shared parenting between unwed genetic parents criticize mothers for not giving the genetic father sufficient opportunity to visit with his genetic child.²³⁰ In assessing how problematic this “gatekeeping” is, one should probably be careful to put oneself in the shoes of the mother.²³¹ Many of the genetic fathers who want greater legal protection for their custodial time are the same ones who could not stop “drinking and drugging” when their children were born.²³² One-third of the mothers that Edin

²²⁹ CARBONE & CAHN, *supra* note 1, at 118.

²³⁰ See Huntington, *supra* note 9, at 202 (criticizing maternal “gatekeeping” and the control that mothers assert over custody); Maldonado, *supra* note 10, at 634 (worrying that mothers have too much power to deny unmarried fathers the access to their children). Edin and Nelson document numerous incidents of gatekeeping and highlight one mother for not letting her child visit the genetic father who, for financial reasons, had to move in with a man accused of raping his girlfriend’s daughter. EDIN & NELSON, *supra* note 10, at 164. Edin and Nelson suggest that because the charges against the alleged rapist were dropped, the mother should not have interfered with visitation. *Id.* With regard to this example, one might pause to consider what would happen if the genetic father had the formal visitation rights that scholars are asking for. Would a judge order the mother to facilitate the visitation at the home of the alleged rapist? At a minimum, wouldn’t the judge require a hearing to determine the validity of the abuse claim? Would any of the parties have the resources to participate meaningfully in that hearing? What some call gatekeeping others might well call appropriate caution—especially given the levels of distrust between the genetic parents.

²³¹ Plenty of middle class women go to court based on less evidence of malfeasance than the women in Edin’s work regularly witness. See Janet R. Johnston et al., *Allegations and Substantiations of Abuse in Custody-Disputing Families*, 43 FAM. CT. REV. 283, 291 (2005) (detailing custody fights over alleged “abuse” and reporting that many allegations of abuse raised in custody-disputing families are not substantiated). In the last year, national news has included stories of two children who were shot and killed by bullets intended for their gang-involved genetic fathers. See Brandon Blackwell, *Former Gang Member Believes Bullet That Killed 3-Year-Old Cleveland Boy Was Meant for Him*, CLEVELAND.COM (Sept. 16, 2015, 2:44 PM), http://www.cleveland.com/metro/index.ssf/2015/09/former_gang_member_believes_bu.html [https://perma.cc/CC9T-7R7M]; Meredith Rodriguez et al., *Top Cop: Boy, 7, Killed by ‘Bullet Meant for His Father’*, CHI. TRIB. (July 5, 2015, 4:45 PM), <http://www.chicagotribune.com/news/local/breaking/ct-grandmother-of-slain-boy-7-who-would-do-that-to-a-baby-20150705-story.html> [https://perma.cc/B897-YKT5]. Would gatekeeping by those mothers have been appropriate? Edin and Kefalas report that most mothers have a low tolerance for criminal activity in the child’s genetic father because it is so likely to endanger the child and lead to the father’s absence. See EDIN & KEFALAS, *supra* note 206, at 84. Is that inappropriate gatekeeping or appropriate parental caution?

²³² The community’s norms and her own sense of responsibility for the child usually compel the mother to stop drinking and drugging once she becomes pregnant. See EDIN &

and Kefalas spoke with attributed the break-up of their relationship with the father to his alcoholism or drug addiction.²³³ Another third mentioned criminal activity and/or jail time.²³⁴ Fifty percent involved domestic violence.²³⁵

If expanding legal rights of genetic fathers threatens genetic mothers' ability to gatekeep, those mothers are likely to be able to invoke the law to strip genetic fathers of the presumptive rights the scholars want to provide for them. The process of doing that is likely to do little more than cost money (that might go to the child) and increase the acrimony between the parties. In the relationships described by McLanahan and Edin, a mother could easily divest an unwed father of his parental rights entirely by showing that he is unfit; chemical dependency, domestic violence, and criminal activity are all grounds for finding unfitness.²³⁶

Even if the mother does not move to terminate all of the genetic father's parental rights, if he is assigned parenting time and does not show up, because he has a new girlfriend or new baby, or is on a bender, in jail, or running from the police, all of which are perfectly likely according to Edin and Nelson, then the mother can move against him to minimize his rights. Currently, the mother is the one who decides whether he is fit enough to exercise visitation.²³⁷ However petty and jealous she may be at times, she is likely much more forgiving of community norms involving addiction, irresponsibility, and some illegality than the law will ever be.

The scholars calling for more equal parenting time are really arguing that the burden should be on the mother to show that the genetic father should not receive equal custodial time, not on him to show that he deserves more time. As mentioned above, any man who has signed a VAP has standing, as a legal father, to go to court to secure more parental rights or a parenting plan.²³⁸ There are numerous reasons why men in these situations may not want to go to court. Going to court is costly and time-consuming, and few people enjoy sharing intimate details of their lives with strangers. But the mother does not want to go to court either. If joint custody and a joint parenting plan are to be the presumptions at birth, then these scholars are saying that the genetic connection alone justifies putting the burden of going to court on her.

KEFALAS, *supra* note 206, at 53. She stops. He does not. Of course she resents him. Do the demands of gender equality force the law to ignore her greater willingness to sacrifice for the sake of the child?

²³³ *Id.* at 81.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ See generally Dep't of Health & Human Servs., *Grounds for Involuntary Termination of Parental Rights*, CHILD WELFARE INFO. GATEWAY (2013), <https://www.childwelfare.gov/pubPDFs/groundtermin.pdf#page=2&view=Grounds> [<https://perma.cc/J6E7-3GCK>] (discussing various grounds for termination of parental rights).

²³⁷ See EDIN & NELSON, *supra* note 10, at 214 (“[M]ost states do virtually nothing to ensure visitation agreements are honored.”).

²³⁸ See 42 U.S.C. § 666(a)(5)(D)(iii) (2012).

Presumably, scholars are willing to impose greater burdens on unwed mothers because they believe it will be in the father's and the child's interest to protect the relationship, but the data on the importance of genetic father involvement in children's lives is mixed.²³⁹ The quality of parenting, including a willingness to be authoritative, matters as much as the quantity of parenting, and unwed genetic fathers often resist authoritative parenting.²⁴⁰ Several studies have concluded that social or functional fathers (i.e., those living with the child) engage in higher quality parenting than do genetic fathers,²⁴¹ particularly if the mother is married to the social father.²⁴² Married mothers trust their husbands, regardless of whether their husbands are genetically related to the child, more than they trust the child's genetic father.²⁴³ Researchers surmise that marriage helps institutionalize the relationship between the functional parents, enabling trust between them and providing stability for the child.²⁴⁴

In many low-income situations, mothers eventually come to the conclusion that it is easier for them and better for the child to just parent alone, without either a social or a genetic father.²⁴⁵ William Julius Wilson writes, "[f]rom the point of view of day-to-day survival, single parenthood reduces the emotional

²³⁹ Lerman & Sorenson, *supra* note 16, at 139.

²⁴⁰ See Paul R. Amato & Joan G. Gilbreth, *Nonresident Fathers and Children's Well-Being: A Meta-Analysis*, 61 J. MARRIAGE & FAM. 557, 565 (1999) ("[E]xtent to which fathers engage in authoritative parenting . . . [is] related to children's well-being."); see also Kari Adamsons & Sara K. Johnson, *An Updated and Expanded Meta-Analysis of Nonresident Fathering and Child Well-Being*, 27 J. FAM. PSYCHOL. 589, 595 (2013) (explaining that quality of engagement and authoritative parenting is more important than "just being there"); Sandra L. Hofferth, Nicole D. Forry & H. Elizabeth Peters, *Child Support, Father-Child Contact, and Preteens' Involvement with Nonresidential Fathers: Racial/Ethnic Differences*, 31 J. FAM. & ECON. ISSUES 14, 15-16 (2009) (discussing research showing that for nonresidential fathers, contact itself does not have a positive impact; the contact must be positive or authoritative). Providing special treats for the child, while leaving the homework and discipline to the other parent, has been shown to have minimal beneficial impact on children—though this is exactly what many of the men in Edin and Nelson's study wanted in their role as father. See EDIN & NELSON, *supra* note 10, at 144-51 (describing men who "provide" for their children by buying them special items, not by providing regular child support or regular discipline).

²⁴¹ Lawrence M. Berger et al., *Parenting Practices of Resident Fathers: The Role of Marital and Biological Ties*, 70 J. MARRIAGE & FAM. 625, 634-35 (2008); Sandra L. Hofferth & Kermyt G. Anderson, *Are All Dads Equal? Biology Versus Marriage as a Basis for Paternal Investment*, 65 J. MARRIAGE & FAM. 213, 230 (2003) ("[M]arriage per se confers advantage in terms of father involvement above and beyond the characteristics of the fathers themselves, whereas biology does not.").

²⁴² See Berger et al., *supra* note 241, at 634-35 ("[W]e find some (marginally significant) evidence that married social fathers are more engaged with children and take more shared responsibility in parenting than married biological fathers.").

²⁴³ *Id.* at 635-36.

²⁴⁴ *Id.*

²⁴⁵ See EDIN & KEFALAS, *supra* note 206, at 190-95 (describing how much easier parenting became for the genetic mother once the genetic father faded away completely).

burden and shields [mothers] from the type of exploitation that often accompanies the sharing of both living arrangements and limited resources.”²⁴⁶ Studies trying to unpack the relative importance of marital versus biological ties suggest that child outcomes in single parent households are just as good as child outcomes in cohabiting or step-family households.²⁴⁷ In other words, a child is no better off being raised by his unmarried genetic mother and father, or by a stepfather married to his genetic mother, than he is being raised by a single mother.

Recent accounts from women in the middle and lower-middle classes, who are unlikely to ask for state support, but are increasingly likely to have children before marriage, suggest that they are also coming to the conclusion that single parenthood is better for them and their children. Observers relate stories of women who would rather protect their own autonomy than try to secure child support from their children’s father.²⁴⁸ Like their working class counterparts, they know that they cannot rely on the genetic fathers for most of their children’s needs.²⁴⁹ They have to provide that themselves. A mother who lets the genetic father into her life substantially, when his job prospects are often worse than hers,²⁵⁰ only runs the risk of making herself responsible for him as well. He might be able to provide childcare, even if he cannot provide money, but his past behavior does not give her confidence in his parenting ability. Usually, just like his working-class counterparts, he has done little to suggest that he is able to accept the serious responsibility of parenthood, and she does not feel that his genetic connection makes him instantly qualified to parent. As Cahn and Carbone summarize, “[t]he ability of men and women whose children do not receive public benefits to walk away from each other reflects an invisible rebalancing of relationships—the custodial parent acquires freedom from the involvement (and potential control) of the other parent and gives up all support.”²⁵¹ These mothers become single parents by choice.

²⁴⁶ WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* 104-05 (1996).

²⁴⁷ Berger et al., *supra* note 241, at 637; Susan L. Brown, *Family Structure & Child Well-Being: The Significance of Parental Cohabitation*, 66 J. MARRIAGE & FAM. 351, 352 (2004).

²⁴⁸ CARBONE & CAHN, *supra* note 1, at 132 (“We frequently see . . . disputes end with the mother’s decision to give up on collecting support in exchange for never having to deal with the father again and the father’s acceptance of the implicit bargain as a good one; . . . [f]or this group, autonomy means staying out of court.”); *see also* HANNA ROSIN, *THE END OF MEN AND THE RISE OF WOMEN* 15 (2012) (noting that lower- or middle-class women are “much less likely to be in abusive relationships, much more likely to make all the decisions about their lives, but they are also much more likely to be raising children alone”).

²⁴⁹ *See* CARBONE & CAHN, *supra* note 1, at 132 (discussing data from the 2009 Census indicating that 29.2% custodial parents cite “[o]ther parent could not afford to pay” as the reason for not seeking a child-support order).

²⁵⁰ *See* ROSIN, *supra* note 248, at 121-26.

²⁵¹ CARBONE & CAHN, *supra* note 1, at 133.

The prevalence of lived, if not legal, single parenthood, even in households with sexually produced children, suggests that the DNA default simply does not work. A significant portion of the genetic fathers identified by the DNA default do not make enough money to contribute meaningfully to the child's economic wellbeing. Those genetic fathers who may be able to contribute in nonfinancial ways can only do so when the mothers let them.²⁵² A mother's willingness to let the genetic father contribute usually depends on her perception that he is as willing as she is, or willing enough, to alter his behavior for the sake of the child. He often does not meet her expectations. So he moves on. That gives the mother significant control, but vesting the father with more legal rights in order to counter that maternal control is not likely to make much difference. If she does not trust him she will ask the law to do what she already does, which is limit his access. Given the realities of many of these unwed fathers' lives, this will not be hard.

The basic problem with all of the proposed plans for more equal division of parenting time is that the proposed coparents do not see themselves as, and have never seen themselves as, sufficiently connected or mutually trustworthy for a coparenting relationship to work. There is no evidence that a binary relationship marked by distrust and an unwillingness to cooperate will serve a child any better than would a unitary parentage regime. In practice today, the binary genetic regime is not serving anyone's interests, and while some scholars remain hopeful that the law can impose the norms necessary for effective coparenting on genetic parents, the evidence from the communities in which the genetic regime governs gives us plenty of reason to question that assumption.

IV. MARRIAGE AND PARENTAL STATUS

A parentage regime based on genetics does not hold much promise, but the forty percent of children born in this country to unmarried mothers might well benefit from a parentage regime that did a better job of providing meaningful alternatives to both marriage and genetics as paths to parentage. Most contemporary family law scholars encouraging the law to embrace new nonmarital paradigms for parentage seem to assume that the supremacy of marriage and the marginalization of nonmarital relationships is *the* problem for nonmarital "families." It is possible, though, that the problem is not so much the marginalization of nonmarital families, as it is the absence of the norms that replicate the work that marriage does in facilitating joint parenting. Put another way, the reason that children of marital relationships do better may well have something to do with the work that marriage is doing for parenting. One does not have to believe that marriage is the best or the only means of securing parental status to appreciate how it might serve as an adequate proxy for those qualities that are likely to make good coparents, including a willingness to trust,

²⁵² See Maldonado, *supra* note 10, at 634 ("[M]others have the power to deny unmarried fathers access to their children.").

work with, and at times provide for, one's coparent. Having the sex that produces a child is not nearly as good a proxy for effective coparenting. This Part tries to unpack the positive work that marriage does, so as to identify what we might want alternative legal parentage frameworks to do to help ensure higher quality parenting.

A. *The Work That Marriage Does*

As every scholar of the institution recognizes, marriage involves a “complex web of social norms and conventions.”²⁵³ Among these norms are cooperation, mutual respect, and reciprocal, if not identical, contributions to the family.²⁵⁴ The law does not enforce most of these norms, though the legal rules surrounding the classification and division of marital property embody a notion that a married couple is an economic unit.²⁵⁵ People understand marriage to be a shared endeavor, usually manifesting itself in shared residence, mutual sacrifice, and joint decision-making. As such, it requires significant commitment.

Because the law no longer enforces these norms directly, one of the law's most important roles in marriage is offering a way to formalize a commitment to marital norms. The law requires people who want to marry to go to a judge, or a member of the clergy, or someone who is otherwise empowered to officiate at their formal ceremony.²⁵⁶ Everyone knows that one must secure a license from the state before one will be treated as married. The legal formalities surrounding marriage make entry into and exit out of marriage time consuming and symbolically weighty.

Marriage is a public institution.²⁵⁷ Members of a community are often asked, or expected, to help married couples keep their commitments.²⁵⁸ If one cannot

²⁵³ Elizabeth S. Scott, *A World Without Marriage*, 41 FAM. L.Q. 537, 548 (2007); see also Andrew Cherlin, *The Growing Diversity of Two-Parent Families: Challenges for Family Law*, in MARRIAGE AT THE CROSSROADS, *supra* note 180, at 287, 287-88 (describing the evolving normative understandings of marriage from an institutional to a companionate to an individualistic arrangement); Martha Garrison & Elizabeth S. Scott, *Legal Regulation of Twenty-First-Century Families*, in MARRIAGE AT THE CROSSROADS, *supra* note 180, at 303, 307 (“[M]arriage typically is grounded in a set of clear expectations . . .”).

²⁵⁴ For an expanded list and further discussion of the norms of marriage, see Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901, 1907-11, 1910 n.17 (2000).

²⁵⁵ See Baker, *supra* note 74, at 350 (explaining and questioning how property-division laws in divorce treat spouses as an economic entity).

²⁵⁶ See Katharine K. Baker, *Marriage and Parenthood as Status and Rights: The Growing, Problematic and Possibly Constitutional Trend to Disaggregate Family Status from Family Rights*, 71 OHIO ST. L.J. 127, 145-46 (2010) (discussing the public nature of marriage).

²⁵⁷ See *id.* at 146 (“The ubiquitous public requirements of marriage suggest that at some fundamental level marriage is about making a statement to others.”).

²⁵⁸ See Thomas B. Holman, *The Influence of Community Involvement on Marital Quality*, 43 J. MARRIAGE & FAM. 143, 144 (1981) (describing research showing “that membership in

live up to one's commitment, one often suffers a certain humiliation. The very widely held understanding of marriage as a commitment helps make marriages relatively stable, and helps ensure that the parties perceive themselves as engaged in a mutual enterprise.

People of all income levels understand marriage in these terms. Adults in communities that have the highest rates of nonmarital childbearing appreciate, and often desire, the commitment, trust, and loyalty that define the marital relationship.²⁵⁹ The absence of marriage in these communities does not reflect an ideological rejection of marital norms, but a practical recognition by men and women that they have not yet found someone whom they trust, with whom they can cooperate, and to whom they can commit.²⁶⁰

For sure, acrimonious divorces can erode parties' abilities to cooperate and trust each other. If the acrimony is thick enough between a divorcing couple, they become bad candidates for extensive joint parenting.²⁶¹ Often, though, divorced parents accept the need to stay respectful and trusting of their ex-spouses, particularly if they receive help from legal and psychological institutions that nudge them toward understanding the benefits of shared parenting.²⁶² The rapid growth of mediation and collaborative divorce for spouses with children demonstrates the growing recognition that cooperation must be one of the hallmarks of postdivorce parenting behavior.²⁶³ Huntington suggests that the same legal and psychological institutions should nudge unwed parents towards norms of sharing and trust.²⁶⁴ That might be possible, but to presume it is likely enough to justify embedding a presumption of equal custodial time is to ask much, much more of unwed parents than the law asks of divorcing parents. It is to ask those unwed parents to conform to the communitarian, autonomy-reducing marital norms that they have specifically eschewed.²⁶⁵

an organization is positively related to marital success").

²⁵⁹ See EDIN & KEFALAS, *supra* note 206, at 120-24.

²⁶⁰ See *id.* at 119-31.

²⁶¹ See *supra* notes 202-04.

²⁶² See *supra* notes 198, 203.

²⁶³ See generally PAULINE H. TESLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION* 1-5 (2d. ed. 2008) (describing the rise of the collaborative law movement since the 1980s).

²⁶⁴ See Huntington, *supra* note 9, at 174 ("To address the problem that nonmarital families do not have effective institutions to help forestall conflict and transition from romantic relationships to co-parenting, this Article proposes the creation of alternative dispute resolution structures.").

²⁶⁵ Edin and Nelson, in particular, suggest that many unwed fathers are simply not up to that task, lacking "the emotional strength to persist when things get tough." EDIN & NELSON, *supra* note 10, at 177. By "stumbling into fatherhood without explicitly planning to do so, men's sense of responsibility for bringing a child into the world in even wildly imperfect circumstances is significantly diminished." *Id.* at 64. They steadfastly refuse to believe that their relationship with their child has to have anything to do with the child's mother. See *id.*

Weiner proposes a “parent-partner status” that will bring with it norms of cooperation and trust so as to facilitate coparenting.²⁶⁶ In doing so, she accurately captures how important it is for parents to understand themselves as in a relationship with each other, but Weiner, like Huntington, assumes that the law can impose these norms on parties who usually have chosen not to enter into the one institution that they recognize as embodying those norms.²⁶⁷ The data suggests that most unwed genetic parents do not get married precisely because they do not want to commit to a relationship of trust and interdependence with the other genetic parent. It is unclear why these scholars are so confident that the law can convince genetic parents to embrace norms that the parents have clearly rejected.

Many legal scholars criticize marriage.²⁶⁸ According to the critiques, marriage is patriarchal, oppressive, stifling, dangerous, racist, conventional, heteronormative, and boring.²⁶⁹ Yet those attributes of marriage are rarely the ones cited by unwed genetic parents as the reason for eschewing marriage.²⁷⁰ What they eschew is the cooperation and interdependence that is necessary for coparenting.²⁷¹

at 101 (“For these men . . . childbearing and marriage have become radically separated.”). Furthermore, although they may try to make the relationship with the woman work, “men embrace the belief that in the end, their relationship with their child is pure and unassailable and should have nothing to do with their relationship to the mother of that child.” *Id.* at 102.

²⁶⁶ See generally WEINER, *supra* note 12, at 131-83 (describing the theoretical foundation for a parent-partner status).

²⁶⁷ See *id.* at 143-53 (discussing the parent-partner status and its effect on the legal duties between coparents).

²⁶⁸ See, e.g., Katherine Franke, *Dignifying Rights: A Comment on Jeremy Waldron’s Dignity, Rights, and Responsibilities*, 43 ARIZ. ST. L.J. 1177, 1197 (2011) (questioning the marriage equality movement’s celebration of marriage); Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 46-47 (2012) (discussing how marriage has been used to force people, particularly African-Americans, into relationships they did not want); Nancy D. Polikoff, *Law That Values All Families: Beyond (Straight and Gay) Marriage*, 22 J. AM. ACAD. MATRIM. L. 85, 87 (2009) (arguing that marriage is not superior to other forms of family); Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236 (2010) (arguing generally for the law to cease privileging any kind of family form); Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 198-212 (2007) (discussing other scholars’ discomfort with privileging marriage and suggesting the law should not channel people into an institution rooted in patriarchy).

²⁶⁹ See *supra* note 268 and accompanying text; see also June Carbone & Naomi Cahn, *Red v. Blue Marriage*, in MARRIAGE AT THE CROSSROADS, *supra* note 180, at 9, 23 (“Modernists, who are more likely to be secularists, distrust references to sin, societally imposed morality, or institutional rigidity [and] [i]n indeed, they often see marriage itself as an outmoded, patriarchal institution designed to police sexuality and subordinate women to men.”).

²⁷⁰ See *supra* notes 259-60.

²⁷¹ See *supra* note 206 and accompanying text (discussing how women want marriage, but understand that it requires commitment and have not yet found someone they want to commit to).

The law needs institutional mechanisms for encouraging cooperation and trust in relationships in which those norms have some hope of sticking. The institution does not have to be marriage, which, as contemporary scholars remind us, brings with it plenty of other problematic baggage, but the law does have to provide ways of reinforcing the norms that best facilitate coparenting. The decision to have sex does very little to help ensure that parties have an interest in working on a long-term relationship marked by trust and mutual respect. Thus, those scholars who assume that coparenting norms can be imposed on parties simply because they had sex that produced a child are probably asking the law to do something it cannot.

B. *Alternatives to Marriage*

A complete description of the kind of legal parentage regime that might incorporate the benefits of marriage for children without marriage itself is beyond the scope of this Article, but the analysis of marital norms suggests that at least two elements are necessary: (1) some formality, so that the parties recognize the legality and gravity of what they are embarking on, and (2) some degree of mutual consent, so that the parties understand that in agreeing to parent, they are agreeing to be committed to each other as well as to the child. Ironically, the kind of legal mechanisms that can help ensure these attributes have been with us for some time, but few people recognize them as such. The examples of adoption and parentage for children born via reproductive technology, both of which require formality and mutual consent, provide useful templates for thinking about how to develop alternative parentage regimes.

1. *Adoption and License*

Adults in every state can apply for parental status through adoption. One or two adults submit forms and fill out applications to be parents.²⁷² If the state approves, those adults receive a full parental license, which brings with it all of the rights and obligations of parenthood.²⁷³ These include rights and obligations vis-à-vis the state and vis-à-vis any other parent. As a constitutional matter, legal parents have the primary right to regulate and influence the behavior of the children for whom they are legal parents.²⁷⁴ This right, the Supreme Court has

²⁷² See UNIF. ADOPTION ACT § 2-203 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1994) (detailing the appropriate procedures for approving potential adopters).

²⁷³ See *id.* § 1-104 (“After a decree of adoption becomes final, each adoptive parent and the adoptee have the legal relationship of parent and child and have all the rights and duties of that relationship.”).

²⁷⁴ See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (“It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.” (citing *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925))).

long understood, is “coupled with . . . [a] high duty.”²⁷⁵ That duty includes an obligation to support the child and protect it from harm.²⁷⁶

Understanding parenthood as a limited package of legal rights and obligations helps explain why it should be seen as a license. Parental status is a license because it is a formal recognition by the state that one is authorized to exercise the rights and required to fulfill the obligations associated with parenthood. If there is more than one person with a license to the same child, they must be viewed as having rights and obligations vis-à-vis each other because their individual abilities to exercise those rights and obligations are completely contingent on the other adult’s behavior. Coparents must understand they are in a legal relationship with each other because they are bound to each other through a dependent child. The child’s needs become the needs of its parent. If there is more than one parent, those parents are necessarily linked in their requirement to meet the child’s needs.

As Huntington and Weiner rightly emphasize, understanding oneself as a coparent with another parent is critical to an effective joint parenting endeavor.²⁷⁷ Helping to parent and care for a child financially, physically, or emotionally, requires cooperation. As every scholar of child support acknowledges, coparents remain financially entwined for the entire period of their child’s minority. A noncustodial parent must help pay for a custodial parent’s rent, heat, car, and food because the custodial parent necessarily shares these items with the child.²⁷⁸ As anyone who has ever tried to juggle a child’s schedule with her own realizes, one must make oneself available, and alert others of one’s whereabouts, if one is assuming meaningful responsibility for a child’s day-to-day existence. As everyone who has ever tried to parent a child through a difficult time knows, consistency and boundary-setting are critically important to a child’s ability to understand expectations and norms. All of that requires sharing of money, information, and one’s interactions with the child. It is impossible to share to the extent necessary if one steadfastly refuses to see oneself as connected to the person with whom one has to share. The law can try to impose sharing obligations on adults, but if those adults never mutually agreed to be legally bound to each other, the law is unlikely to be successful. When registering for a license with someone else, individuals should be required to aver, not that they have any genetic relationship to the child, but that they understand themselves to have ongoing obligations to each other as parents. An

²⁷⁵ *Pierce*, 268 U.S. at 535.

²⁷⁶ When parents fail to support or protect a child adequately, the state exercises its *parens patriae* authority to override parental action. *Prince*, 321 U.S. at 167 (“[T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child’s welfare . . .”). Abuse and neglect proceedings are the regulatory manifestation of the state exercising its *parens patriae* authority on behalf of children.

²⁷⁷ See WEINER, *supra* note 12, at 86; Huntington, *supra* note 9, at 202.

²⁷⁸ See Baker, *supra* note 74, at 330.

intent to parent together is an intent to be legally bound to each other, not just to the child.

2. Contract and Mutual Consent

We already have some indication of how courts use mutual consent to determine parental rights. Just as buyers and seller of gametes enter into enforceable contracts that determine parental status based on something other than genetics, so same-sex couples have entered into agreements that allow nongenetic parents to be assigned rights and obligations. Many gay and lesbian couples, particularly before same-sex couples were allowed to marry or enter into civil unions, or mutually adopt a child, executed documents indicating a desire to be legally bound in an agreement to share parental rights.²⁷⁹ Not all courts honored these agreements,²⁸⁰ but many did. The more formal and explicit the documents, the more willing courts are to force a signatory to comply with the agreement.²⁸¹ Thus, legal genetic parents are forced to share parental rights with nongenetic parents because they mutually agreed to do so.

Couples who do not execute documents indicating a desire to share parental rights often rely on some notion of implicit contract. When previously unacknowledged parents ask courts to recognize their rights as parents in the absence of an explicit agreement, they argue that one parent has willingly let the other adult into the child's life in a way that suggests an implicit agreement to share parental rights and obligations. An implicit contract argument overlaps substantially with "functional parenthood" arguments²⁸² because the facts relevant to an implicit contract also tend to show a functioning parenting relationship. The contract between the adults in such cases—the implicit "meeting of the minds"—is critical to the law's willingness to accept functional arguments.²⁸³

The American Law Institute's attempt to codify the rights of functional parents with the de facto parent doctrine requires "agreement of a legal parent

²⁷⁹ See *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 892 n.10 (Mass. 1999) ("We view the agreement as indicative of the [legal parent's] consent to and encouragement of the [de facto parent's] relationship with the child."); *J.A.L. v. E.P.H.*, 682 A.2d 1314, 1321 (Pa. 1996) (holding that participation and acquiescence of legal mother in her partner's parenting of the child was critical in finding that partner had standing to sue for custodial rights); *Rubano v. DiCenzo*, 759 A.2d 959, 968 (R.I. 2000) (holding de facto parent's right to visitation rooted in executed visitation agreement with legal parent).

²⁸⁰ See, e.g., *T.F. v. B.L.*, 813 N.E.2d 1244, 1252 (Mass. 2004). Massachusetts refused to hold the nonlegal parent liable for child support based on an informal oral agreement to share in the rights and obligations of parenthood. *Id.*; see also *Janice M. v. Margaret K.*, 948 A.2d 73, 80 (Md. 2008) (declining to accept implicit contract or de facto parent theories).

²⁸¹ Compare cases cited *supra* note 279, with cases cited *supra* note 280.

²⁸² For the foundational scholarship, and for more on how functional arguments relate to intent-based (or implicit contract) arguments, see *See NeJaime, supra* note 2, at 1188 n.12, 1222-30.

²⁸³ See *id.* (discussing the role of intentionality in functional parenthood arguments).

[to let another adult] form a parent-child relationship.”²⁸⁴ Wisconsin, the state that pioneered the de facto parent doctrine, also requires agreement.²⁸⁵ It is the notion of a mutual agreement between adults to parent that is critical to explicit and implicit parental contract claims, though wholly absent in a DNA default regime.

This is not the place to detail the precise legal status of parental contracts, but these agreements might operate like divorce settlement agreements do today. Settlement agreements are usually not enforceable as contracts, per se, but they are often accepted as is, and incorporated into court judgments.²⁸⁶ The parties’ discretion to structure their child support and custody agreements is limited by the courts’ *parens patriae* obligation to make sure that any children’s interests are being adequately protected, but in practice, courts afford parents considerable deference in allocating rights and responsibilities as they want.²⁸⁷ Courts could afford adults comparable deference when reviewing how they want to share their parental license.

C. *Embracing the Possibilities*

Filling the void left by rejecting marriage with a regime based on license and contract opens up possibilities for more transformative forms of parenthood. For instance, states or counties could experiment with agreements involving more than two parents. For these parenting arrangements, states could develop more nuanced ways of determining support obligations. The child support formulae that determine obligation today are rooted in a two-parent, shared-household ideal that rarely—if ever—exists for most of the children whom it is designed to protect.²⁸⁸ Any state that imposes an obligation on more than two parents now uses formulae rooted in a wholly inapposite, binary parenthood model.²⁸⁹

In a new regime, states willing to entertain parental relationships involving more than two parents could develop alternative models or let the individuals structure the arrangement themselves. If the registered agreement serves as the foundation of the parental relationship, those adults could bargain for the rights and obligations of parenthood. Some states might want to limit the number of

²⁸⁴ PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(c)(ii) (AM. LAW INST. 2002) (explaining how in the absence of an agreement, a de facto parent acquires standing only if there has been a “complete failure or inability of any legal parent to perform caretaking functions”).

²⁸⁵ See *Holtzman v. Knott*, 533 N.W.2d 419, 435-36 (Wis. 1995) (making consent of the established parent an element of establishing a functional parent claim).

²⁸⁶ See Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1475-76 (discussing how divorcing spouse’s agreements are often rubber-stamped by courts).

²⁸⁷ See *id.*

²⁸⁸ See *supra* Section III.B.

²⁸⁹ To date, only a few states have been willing to assign parentage to more than two people. See *Baker*, *supra* note 74, at 344 (discussing “the theoretical vacuum at the core of any . . . award” for more than two parents, as child support formulae are all based on a two-parent household norm).

parents to two or three; some might be willing to accept more parents, with differing levels of obligation. Single parents, male or female, who do not want to share the rights and responsibilities of parenthood, could do so freely under such a system.

This kind of system may seem far-fetched today, but a relatively inexpensive public education campaign could go a long way toward convincing people of its importance.²⁹⁰ Nancy Polikoff suggested a kind of registration system years ago.²⁹¹ Moreover, most low-income “parents” already register for parenthood by signing a VAP.²⁹² What they are asked to aver by signing the VAP now is that they have a genetic connection. What they could be asked to aver is that they agree to share in the rights and responsibilities of parenthood.

Many low-income couples who sign VAPs today might register for this kind of joint parental license. Perhaps the euphoria of the delivery room that leads them to accept coparenthood today,²⁹³ will lead them to enter into a joint license as a matter of course. If that happens, not much will change. Still, the registration process can reinforce the principle that by signing up for parenthood, both adults are formally binding themselves to each other and the state. Different regimes might also develop a system, again comparable to an adoption model, that provides for an interim license to parents that does not become final until a year after it is signed.²⁹⁴ An interim year of practice may give the intended parents a much better sense of whether they will be able to coparent than does the wonder of the baby’s delivery.

A good way to encourage all those who intend to coparent to register with the state would be to make the registration process mandatory, even if the intended parents are married. This idea should come as relief to marriage critics. I have argued that marriage serves as a decent proxy for the kind of qualities a parentage regime should foster, but forcing married couples to register as parents would reinforce the idea that parenthood itself is a mutual legal status determining ones rights vis-à-vis both the state and the other parent. The more that parents understand parenthood as a bundle of legal rights and obligations

²⁹⁰ As a society we manage to get most children vaccinated, registered for school, and enrolled in a health insurance program. Surely we could design a parental registration system that makes sure most children have licensed parents.

²⁹¹ NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* 134 (2008) (“A simple way to implement the valuing-all-families approach is a registration system for those who lack a spouse/partner but wish to identify someone considered a family member.”).

²⁹² *See supra* note 61.

²⁹³ *See supra* notes 216-17 and accompanying text.

²⁹⁴ Although courts have grown somewhat stricter recently, a birth mother usually has up to a year to claim fraud or duress in the signing of her adoption consent. Until the one-year mark, the parentage of the adoptee is not final. *See, e.g.*, 750 ILL. COMP. STAT. 50/11(a) (2016); UNIF. ADOPTION ACT, *supra* note 272, § 702 (discussing the process of an interim order of parenthood, which does not become final for a year).

that emanate from the state, not nature, the easier it will be to effectuate comprehensive registration.

There is also the question of parental status at birth for sexually produced children. Perhaps women should be presumed parents because—absent a surrogacy contract to the contrary—they intended to be parents, by virtue of them not terminating the pregnancy, and they contributed all of the resources (save one small sperm) and labor necessary for the child's existence. States could be free to approach this issue in different ways also. Some states might make the birth mother a presumptive parent, whose parental status was hers for the taking as long as she registered, and hers for the sharing if she entered into a mutual agreement with someone else. Constitutional doctrine suggests that this would be appropriate.²⁹⁵

Other states, possibly in the name of gender equality, might make a newborn child the child of no one, and leave it up to the state to assign parentage to the first or best person to apply. In most instances, this would probably be the birth mother, but at the licensing stage, she might have competition.

Once it becomes clear that parentage, like all designations of family, are questions of politics and law, not questions of science and fact, then the possibilities for family formation become almost infinite. A state-licensing regime that displaces both marriage and genetics frees up everyone to think more creatively about what parenthood should be. Contemporary data suggests that some marital norms, particularly those involving commitment and interdependence between adults, facilitate effective parenting. A state-licensing regime can incorporate those norms without relying on marriage itself.

CONCLUSION

When one pauses to contemplate the momentous social, economic, legal, and technological changes that have impacted families over the last century, it is surprising that the way the law establishes parenthood has not undergone more change. The laws and norms that governed sexual and economic relationships between men and women have been upended and replaced with laws and norms that allow much more sex and very different kinds of economic obligation. The demise, for all but the wealthiest, of jobs that can sustain a single provider household wreaks havoc with both social and legal expectations for providing for children. The ways in which children are conceived and cared for are much more classed and varied, often much less gendered, and sometimes far more commercial than ever before. Furthermore, the Supreme Court has squarely rejected the idea that the state has a legitimate interest in ensuring that children have both a mother and a father.²⁹⁶

²⁹⁵ See *supra* notes 123-26 and accompanying text.

²⁹⁶ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015) (noting that two parents of the same sex often provide parental love and nurture for children and therefore ruling that the state does not have a compelling interest in ensuring that a child have both a mother and a father).

In trying to incorporate some of these changes, the law has taken incremental steps without rethinking the entire regime. Those incremental steps have rendered the regime as a whole incoherent. It makes no sense to draw an impenetrable line separating how parenthood is determined based on how the child is conceived. It makes no sense to assume that an adult's child support obligation should be based on a two-parent household norm that has never reflected reality for the adults most affected by its reach. It makes no sense, given contemporary sexual norms, to assume that two people who decide to have sex are simultaneously committing to coparenting. And it makes no sense to exclude vast numbers of adults from parenthood simply because they have no genetic connection to the child.

The DNA default, as originally conceived, was an attempt to bind men to children whom the community did not want to support. It does not work. It does not provide children with lasting, supportive, emotional relationships; it does not provide children with the resources that they need. What it does instead is reify a binary heterosexual parenting norm; it roots parenthood in genetics and thereby establishes that there are two, and only two, parents, one of each gender. It polices sex by forcing parenthood onto men simply because they had sex with a woman who chose to maintain the pregnancy, and it ignores the substantially greater biological investment that women often make in children.

Marriage, the main alternative to the DNA default, continues to serve as a path to parenthood for a little more than half of the children in the United States. Children who are raised by their marital parents appear to benefit from their parents having been married. It is time for the law to embrace what marriage does right in assigning parentage, so that those children born outside of marriage have their parentage determined by a regime that facilitates effective and meaningful parentage, without relying on genetics.

The law has taken incremental steps to create new nonmarital paths to parenthood that involve neither genetics nor marriage, including licensing parents through adoption and recognizing binding contracts to share parental rights with adult partners. Purposefully or not, those incremental steps reflect the parenting values of formality and mutuality embedded in marriage. At the margins, through adoption and contract, the law has recognized as parents nongenetically related adults who are willing to embrace the formality and mutuality of parenting. In doing so, the law has already provided paradigms that could fully displace the DNA default and marriage. Whether one's primary concern is minimizing the importance of marriage or minimizing the importance of genetics, it is now time to rethink what should be considered marginal when it comes to establishing parenthood.